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In The

Supreme Court of the United States

October Term, 1997

PETER TISCHMANN,
Petitioner,

v.

ITT/SHERATON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

I. Should this Court resolve the conflict between the Circuits and settle the question of whether the Seventh Amendment to the United States Constitution guarantees the right to a jury trial in an action, under Section 502(a)(1)(B) of the Employment Retirement Income Security Act ("ERISA"), for monetary damages for failure to pay benefits due, where ERISA has preempted a common law cause of action for money damages, legal in nature, which carried with it the right to a trial by jury?

II. Should this Court settle the question of whether Section 502(a)(1)(B) of ERISA permits or requires a jury trial in actions for monetary damages for failure to pay benefits due?

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Table of Contents

Questions Presented for Review i

Parties to the Proceeding in the United States Court of Appeals for the Second Circuit ii

Table of Contents iii

Table of Authorities vii

Petition for Writ of Certiorari 1

Citation of Opinions and Orders 2

Basis for Jurisdiction in This Court 2

Constitutional Amendment and Statutes in Question 3

Statement of the Case 4

The Instant Action 5

Jurisdiction in the District Court 5

Defendant's Motion for Summary Judgment 5

The Jury Trial 6

The Jury's Verdict 7

Defendant's Motion to Set the Verdict Aside 7

The Magistrate Judge's Decision to Disregard the Jury Verdict 7

The Appeal to the Second Circuit 8

Argument in Support of Petition 11

Point I 11

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AND SETTLE THE QUESTION OF WHETHER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES THE RIGHT TO A JURY TRIAL IN AN ACTION, UNDER SECTION 502(a)(1)(B) OF ERISA, FOR MONETARY DAMAGES FOR FAILURE TO PAY BENEFITS DUE, WHERE ERISA HAS PREEMPTED A COMMON LAW CAUSE OF ACTION FOR MONEY DAMAGES, LEGAL IN NATURE, WHICH TRADITIONALLY CARRIED WITH IT THE RIGHT TO A TRIAL BY JURY.

A. The Seventh Amendment 11

B. Seventh Amendment Jurisprudence Where the Statute is Silent 14

C. The Two-Part *Terry/Tull* Test 15

D. ERISA After *Firestone* and *Terry* . . 16

E. Tischmann was Entitled to a Jury Trial under the Two-Part *Terry/Tull* Test, Which The Second Circuit Failed to Apply 21

Point II 23

THIS COURT SHOULD SETTLE THE QUESTION OF WHETHER SECTION 502(a)(1)(B) OF ERISA PERMITS OR REQUIRES A JURY TRIAL IN ACTIONS FOR MONETARY DAMAGES FOR FAILURE TO PAY BENEFITS DUE.

A. ERISA is Silent on the Issue of Trial by Jury, But its History Suggests that Jury Trials are Available in Benefits Due Claims 23

B. ERISA's Legislative History 25

C. Conclusion 29

APPENDICES

Appendix A—Circuit Court Opinion A-1

Appendix B—District Court Opinion, dated April 18, 1997 (Magistrate Judge Dolinger) B-1

Appendix C—District Court Opinion, dated April 7, 1995 (Judge Kram) C-1

Appendix D—28 U.S.C. §1102 . . . . . D-1

Table of Authorities

Cases — Page

Adams v. Cyprus Amax Mineral Co.,
954 F. Supp. 1470 (D. Co. 1997) 19

Algie v. RCA Global Communication, Inc.,
891 F. Supp. 870 (S.D.N.Y. 1994), aff'd on other grounds, 60 F.3d 956 (2d Cir. 1995) 20

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 26

Berry v. Ciba-Geigy Corp.,
761 F.2d 1003 (4th Cir. 1985) 17, 19, 20

Bittinger v. Tecumseh Products Company,
123 F.3d 877 (6th Cir. 1997) 18, 23

Blau v. Del Monte Corp.,
748 F.2d 1348 (9th Cir. 1984),
cert. denied, 474 U.S. 865 (1985) 18

Blue Cross & Blue Shield of Alabama v. Lewis,
753 F. Supp. 345 (N.D. Ala. 1990) 20

Borst v. Chevron Corp.,
36 F.3d 1308 (5th Cir. 1994),
cert. denied, 514 U.S. 1066 (1995) 18, 19, 23

Cox v. Keystone Carbon Co.,
894 F.2d 647 (3d Cir.),
cert. denied, 498 U.S. 811 (1990) 17

Daniel v. Eaton Corp.,
839 F.2d 263 (6th Cir.),
cert. denied, 488 U.S. 826 (1988) 17

DeFelice v. American Int'l Life
Assurance Co. of New York,
112 F.3d 61 (2d Cir. 1997) 21

Dimick v. Schiedt, 293 U.S. 474 (1935) 13

Feltner v. Columbia Pictures Television, Inc.,
___ U.S. ___, 118 S. Ct. 1279,
1998 U.S. LEXIS 2301 (March 31, 1998) 16, 25

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989) 16, 17, 19-21, 25, 26

Gangitano v. NN Investors Life Ins. Co., Inc.,
733 F. Supp. 342 (S.D.Fla. 1990) 20

Granfinanciera S.A. v. Nordberg,
429 U.S. 33 (1989) 14-16

Higginbotham v. Worth Publishers, Inc.,
820 F. Supp. 48 (D.P.R. 1993) 20

Howard v. Parisian, Inc.,
807 F.2d 1560 (11th Cir. 1987) 17

Hulcher v. United Behavioral Systems, Inc., 919 F.
Supp. 879 (E.D. Va. 1995) 19, 20

In re Vorpahl,
695 F.2d 318 (8th Cir. 1982) 18

Isbrandtsen Co. v. Johnson,
343 U.S. 779 (1952) 26

Jacob v. City of New York,
315 U.S. 752 (1942) 13

Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 24

McDonald v. Artcraft Elec. Supply Co.,
774 F. Supp. 29 (D.D.C. 1991) 20, 26

McKinnon v. Blue Cross-Blue Shield,
691 F. Supp. 1314 (N.D. Ala. 1988),
aff'd, 874 F.2d 820 (11th Cir. 1989) 27

Parklane Hosiery Co., Inc. v. Shore,
439 U.S. 322 (1979) 12

Parsons v. Bedford,
28 U.S. (3 Pet.) 433 (1830) 13

Randall v. Loftsgaarden, 478 U.S. 647 (1986) 26

Rhodes v. Piggly Wiggly Alabama Distrib. Co.,
741 F. Supp. 1542 (N.D. Ala. 1990) 20

Steeples v. Time Ins. Co.,
139 F.R.D. 688 (N.D. Okla. 1991) 20

Sullivan v. LTV Aerospace & Defense Co.,
82 F.3d 1251 (2d Cir. 1996) 21

Teamsters v. Terry,
494 U.S. 558 (1990) 15, 16, 18, 19, 21-24

Tull v. United States,
481 U.S. 412 (1987) 14-16, 18, 19, 21, 22, 24

United States v. United Continental Tuna Corp.,
425 U.S. 164 (1976) 26

Vaughn v. Owen Steel Company, Inc.,
871 F. Supp. 247 (D. S.Ca. 1994) 19

Vicinanzo v. Brunschwig & Fils, Inc.,
739 F. Supp. 882 (S.D.N.Y. 1990) 20

Wardle v. Central States S.E. & S.W. Areas Pension
Fund, 627 F.2d 820 (7th Cir. 1980),
cert. denied, 449 U.S. 1112 (1981) 18, 26

Zimmerman v. Sloss Equipment, Inc.,
72 F.3d 822 (10th Cir. 1995) 17, 18

Statutes and Other Authority Page

29 U.S.C. § 1001 27

29 U.S.C. § 1015 24

29 U.S.C. § 1102 24

29 U.S.C. § 1103 24

29 U.S.C. § 1105 24

29 U.S.C. § 1132 24

29 U.S.C. § 2003 24

Declaration of Independence 12

Employment Retirement Income
Security Act, 29 U.S.C. § 1001, *et seq.* . 17-21, 23, 24

Flint, ERISA: Jury Trial Mandated for Benefit Claims
Action, 25 Loy. L.A. L. Rev. 361 (1992) . . 24-26, 28

H.R. Rep. No. 533, 93d Cong., 2d Sess. 17 (1973) . 27

Joseph Story, Commentaries on the Constitution of the
United States (5th ed. 1891) 12

S. Rep. No. 127, 93d Cong., 2d Sess. 1, 35 (1973) . 27

The Federalist (Clinton Rossiter ed. 1961) 12

Thomas Jefferson, The Writings of Thomas Jefferson
(Washington ed. 1861) 13

U.S. Const. amend. VII . 11, 14-16, 18, 19, 21, 23, 29

William Blackstone, Commentaries (1768) 13

Petition for Writ of Certiorari

Petitioner, Peter Tischmann, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on June 10, 1998, in order to:

(a) Decide whether the Seventh Amendment to the United States Constitution guarantees the right to a jury trial in an action, under Section 502(a)(1)(B) of the Employment Retirement Income Security Act ("ERISA"), for monetary damages for failure to pay benefits due, where ERISA has preempted a common law cause of action for money damages, legal in nature, which carried with it the right to a trial by jury;

(b) Resolve the conflict between the opinion of the Second Circuit herein and the recent decisions of this Court in Feltner v. Columbia Pictures Television, Inc., ___ U.S. ___, 118 S. Ct. 1279 (1998), Teamsters v. Terry, 494 U.S. 558 (1990), Granfinanciera S.A. v. Nordberg, 429 U.S. 33 (1989), and Tull v. United States, 481 U.S. 412 (1987) and the holdings or rationale of other Circuit Courts of Appeals in Bittinger v. Tecumseh Products Company, 123 F.3d 877 (6th Cir. 1997), and Borst v. Chevron Corp., 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995);

(c) Decide whether Section 502(a)(1)(B)[1] of

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[1] 29 U.S.C. §1132(a)(1)(B).

ERISA permits or requires a jury trial in actions for monetary damages for failure to pay benefits due.

Citation of Opinions and Orders

The opinion of the United States Court of Appeals for the Second Circuit, Peter Tischmann v. ITT/Sheraton Corporation, __ F.3d __, 1998 U.S. App. LEXIS 12102 (2d Cir. June 10, 1998), is reprinted in Appendix A hereto at page A-1. The opinion of the United States District Court for the Southern District of New York, Peter Tischmann v. ITT/Sheraton Corporation, __ F. Supp. __, 1997 U.S. LEXIS 5283 (S.D.N.Y. April 18, 1997) (Michael H. Dolinger, Magistrate Judge), is reprinted in Appendix B hereto at page B-1. The opinion of the United States District Court for the Southern District of New York on defendant's motion for summary judgment, Peter Tischmann v. ITT/Sheraton Corporation, 882 F. Supp. 1358 (S.D.N.Y. 1995) (Shirley Wohl Kram, U.S.D.J.), is reprinted in Appendix C hereto at page C-1.

Basis for Jurisdiction in This Court

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 10, 1998. There has been no application or order respecting rehearing or order granting an extension of time to file the petition for a writ of certiorari. This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. §1254(1). Rule 29.4(b) or (c) of

this Court does not apply.

Constitutional Amendment and Statutes in Question

This case involves the following Constitutional Amendment and statutes:

1. The Seventh Amendment to the United States Constitution, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. The Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1988), specifically including the following provisions:

(a) 28 U.S.C. § 1132:

> "(a) Persons empowered to bring a civil action. A civil action may be brought— (1) by a participant or beneficiary— . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ."

and

(b) 28 U.S.C. § 1102, which is reproduced in relevant part in Appendix D, attached hereto.

Statement of the Case

Peter Tischmann ("Tischmann"), formerly the Vice President and Managing Director of the St. Regis Hotel in New York City, was terminated from his employment on March 12, 1992, allegedly for violating the policies of his employer, ITT/Sheraton Corporation ("ITT/Sheraton" or "Sheraton"), against sexual harassment. (B-2[2])

From 1986-1989, Tischmann was employed pursuant to written employment agreements with Sheraton. (A-3) At the end of 1989, Sheraton replaced Tischmann's written employment contract with a written Severance Agreement which provided, *inter alia*, that he would receive two years' base salary as severance pay in the event of his involuntary termination, unless he was terminated "for cause." (A-3) The Severance Agreement was not funded; payments were to be made from Sheraton's general corporate assets. (B-29)

In early 1992, the head of St. Regis' Human Resources Department and her assistant complained that Tischmann had sexually harassed them. Thereafter, Sheraton terminated Tischmann's employment and declared him ineligible for severance, allegedly because his termination was "for cause." (A-4)

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[2] Unless otherwise noted, all citations are to the Appendix which is attached hereto. Citations "A-" refer to Appendix A, "B-" refer to Appendix B, etc.

The Instant Action

On February 12, 1993, Tischmann filed an Amended Complaint against Sheraton in the United States District Court for the Southern District of New York. Citing state law, including common law, Tischmann sought multiple forms of relief, including compensatory and punitive damages, for, *inter alia*, breach of the contractual agreement to pay severance. (A-4)

Tischmann asserted he had not sexually harassed his subordinates and was not fired "for cause," but, instead, was fired arbitrarily and in bad faith. Tischmann sought a trial by jury on his claims. (A-5)

Jurisdiction in the District Court

Jurisdiction in the District Court was conferred, *inter alia*, by 28 U.S.C. § 1332(a). There was complete diversity of citizenship between the parties as Tischmann was domiciled in New York while ITT/Sheraton was incorporated in Delaware and maintained its principal place of business in Massachusetts. The amount in controversy, exclusive of interest and costs, exceeded the then jurisdictional amount of $50,000.

Defendant's Motion for Summary Judgment

In April 1994, ITT/Sheraton moved for summary judgment. In an opinion entered April 10, 1995, Peter Tischmann v. ITT/Sheraton Corporation, 882 F. Supp. 1358 (S.D.N.Y. 1995), District Judge Shirley Wohl Kram

granted summary judgment dismissing all causes of action except Tischmann's claim for breach of contract to pay severance and his New York Labor Law §190 claim for failure to pay wages. (C-1—C-33)

Citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) and James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463 (2d Cir. 1993), Judge Kram concluded that the Severance Agreement was not a "plan" within the meaning of ERISA since it was not funded and did not contemplate an ongoing administrative program. Consequently, Judge Kram found that Tischmann's common law and state law claims were not preempted. (C-23—C-27, C-28—C-29)

Tischmann's surviving claims were thus for legal relief seeking money damages only.

The Jury Trial

The parties consented to trial before a Magistrate Judge pursuant to 28 U.S.C. §636(c). (A-5) Before trial, defendant moved before the Magistrate Judge for reconsideration of Judge Kram's ruling that Tischmann's claims were not preempted by ERISA. Magistrate Judge Dolinger took defendant's request under advisement and the next morning the parties commenced the jury trial. (A-6)

The Jury's Verdict

On October 17, 1996, the jury returned a special verdict in favor of Tischmann finding that ITT/Sheraton's termination of Tischmann had been arbitrary or in bad faith. By virtue of this verdict, Tischmann was entitled to a judgment, under New York law, in the amount of $364,000, not including interest, costs and legal fees. (A-6)

Defendant's Motion to Set the Verdict Aside

Prior to entry of judgment, Sheraton moved (1) for judgment setting aside the jury verdict pursuant to Fed. R. Civ. P. 50 on the grounds that there was no legally sufficient evidentiary basis for the jury's finding, (2) for reconsideration of District Judge Kram's ruling that the severance agreement was not an ERISA plan, or, in the alternative, (3) for a new trial pursuant to Fed. R. Civ. P. 59. (B-9)

The Magistrate Judge's
Decision to Disregard the Jury Verdict

On April 18, 1997, Magistrate Judge Dolinger issued a Memorandum Opinion and Order holding that Tischmann had presented legally sufficient evidence to support the jury's finding that Sheraton's decision to terminate him for cause was arbitrary or in bad faith. The Magistrate Judge also denied as "baseless" ITT/Sheraton's objections to the jury instructions. (B-9—B-11) However, the Magistrate Judge granted reconsideration of Judge

Kram's ruling on the ERISA issue and determined that the Severance Agreement was an "ERISA plan." Accordingly, the Court held that Tischmann's common law breach of contract claim was preempted, and his claim was "construed as a claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B)." (B-12—B-14) Relying on Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1258-59 (2d Cir. 1996), the Magistrate Judge concluded that Tischmann was not entitled to a jury trial and that his claims should be decided by the court. (B-24—B-25)

Magistrate Judge Dolinger then set aside the jury's verdict, found (contrary to the jury's verdict) that the denial of benefits was not arbitrary or capricious, and concluded that Tischmann's claim under New York Labor Law § 190 was preempted by ERISA or, alternatively, that the denial of benefits was justified. (B-72) Judgment dismissing Tischmann's complaint was entered, and an appeal to the Second Circuit followed. (A-7)

The Appeal to the Second Circuit

In the Second Circuit, Tischmann's appeal focused on two contentions. First, he contended that even under ERISA he should have been accorded a trial by jury. Second, he contended that his state law claims were not preempted by ERISA. (A-7)

While the appeal was *sub judice*, this Court decided Feltner v. Columbia Pictures Television, Inc., __ U.S.__, 118 S. Ct. 1279 (1998), which held that "the Seventh

Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself", and reaffirmed its prior holdings in Teamsters v. Terry, 494 U.S. 558 (1990), Granfinanciera S.A. v. Nordberg, 429 U.S. 33 (1989), and Tull v. United States, 481 U.S. 412 (1987), regarding the Seventh Amendment guarantee of trial by jury. Pursuant to Fed. R. App. P. 28(j), Tischmann's counsel advised the Clerk of the Second Circuit of this decision and its relevance to the instant appeal.

In affirming the judgment (A-21), the Second Circuit, relying on its earlier decisions in DeFelice v. American Int'l Life Assurance Co. of New York, 112 F.3d 61, 64 (2d Cir. 1997) and Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1258-59 (2d Cir. 1996), stated, unequivocally, that "there is no right to a jury trial in a suit brought to recover ERISA benefits." (A-20) The Court made no reference to the Supreme Court's recent decisions regarding the right to trial by jury and did not apply the two-part test propounded by this Court in Teamsters v. Terry, 494 U.S. 558 (1990), to determine whether plaintiff's claims were equitable or legal in nature.

Instead, the Second Circuit, in direct conflict with this Court's recent decisions concerning the Seventh Amendment and in conflict with decisions of other Circuit Courts which recognized that ERISA claims for benefits due may afford the right to a jury trial, announced an

unequivocal rule that plaintiffs with ERISA claims are not entitled to trial by jury under any circumstances. See Bittinger v. Tecumseh Products Company, 123 F.3d 877, 883 (6th Cir. 1997) ("claims under § 502(a)(1)(B)—may carry with them a jury trial right . . ."); Borst v. Chevron Corp., 36 F.3d 1308, 1323-24 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995) (applying the Terry analysis to determine whether the cause of action carried with it the right to trial by jury) and Zimmerman v. Sloss Equipment, Inc., 72 F.3d 822 (10th Cir. 1995) (acknowledging that denial of jury trial for claims which were triable to a jury at common law but preempted by ERISA presents a "thorny issue," but declining to reach that issue).

Argument in Support of Petition
Point I

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AND SETTLE THE QUESTION OF WHETHER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES THE RIGHT TO A JURY TRIAL IN AN ACTION, UNDER SECTION 502(a)(1)(B) OF ERISA, FOR MONETARY DAMAGES FOR FAILURE TO PAY BENEFITS DUE, WHERE ERISA HAS PREEMPTED A COMMON LAW CAUSE OF ACTION FOR MONEY DAMAGES, LEGAL IN NATURE, WHICH TRADITIONALLY CARRIED WITH IT THE RIGHT TO A TRIAL BY JURY.

A. The Seventh Amendment

The Seventh Amendment to the United States Constitution provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Any consideration of the scope and applicability of the Seventh Amendment guarantee of the right to a jury trial must begin with an appreciation of the surpassing importance which the Framers attached to this right. It was considered to be:

"an important bulwark against tyranny and

> corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting)

The abrogation of the right to trial by jury was one of the American colonists' principal grievances against the Crown, specifically included among the indictments of George III in the Declaration of Independence. See The Declaration of Independence, para. 20 (1776) ("For depriving us, in many cases, of the Benefits of Trial by Jury"). Perhaps the objection to the proposed Constitution that gained the most currency, "well-nigh preventing its ratification," was its failure to guarantee the right to trial by jury in civil cases. See Joseph Story, Commentaries on the Constitution of the United States, §1763 (5th ed. 1891). James Hamilton, in The Federalist, felt compelled to assure those considering ratification that the Framers intended no diminishment of the right to trial by jury:

> "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

The Federalist No. 83, at 499 (Clinton Rossiter ed. 1961).

Thomas Jefferson regarded the right as "the only

anchor yet imagined by man, by which a government can be held to the principles of its constitution." Thomas Jefferson, The Writings of Thomas Jefferson, at p. 71 (Washington ed. 1861) (quoted in Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting). In their unbridled devotion to the right of trial by jury, the Framers echoed Lord Blackstone—their primary source on the law—who viewed the right to trial by jury as "the glory of the English law," and "the most transcendent privilege which any subject can enjoy." 3 William Blackstone, Commentaries, at p. 379 (1768).

This Court early on reaffirmed the historic significance of the right to trial by jury. See, e.g., Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."). In Dimick v. Schiedt, 293 U.S. 474, 486 (1935), the Court admonished that:

> "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

See also Jacob v. City of New York, 315 U.S. 752, 752-753 (1942) ("A right so fundamental and sacred to the citizen . . . should be jealously guarded by the courts.").

B. Seventh Amendment Jurisprudence Where the Statute is Silent

Over the past twelve years, this Court has decided four cases recognizing the Constitutional right to a jury trial where a statute is silent on the matter. In Tull v. United States, 481 U.S. 412, 417 (1987), the Court held that a litigant facing civil penalties under the Clean Water Act was entitled to a jury trial under the Seventh Amendment. Id. at 425. Although neither the language of the Clean Water Act nor its legislative history implied any right to a jury trial, this Court concluded that, because the civil penalties sought by the government were similar in nature to punitive damages, and because mixed claims for legal and equitable relief require a jury trial on the legal claims, including all issues common to both claims, the Seventh Amendment guaranteed a jury trial. Id. at 422-25.

In Granfinanciera S.A. v. Nordberg, 429 U.S. 33 (1989), this Court confirmed the right to jury trial in cases of statutory silence, holding that the Seventh Amendment guaranteed a jury trial to a bankruptcy trustee on a claim of fraudulent conveyance, even though the Bankruptcy Code had traditionally been viewed as not providing for jury trials. This result was mandated because the fraudulent conveyance claim was comparable to a common law claim to recover fraudulent transfers by a bankrupt, a which was claim triable to a jury before 1791. Id. at 45-47.

In so ruling, this Court observed that Congress

"lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." Id. at 51-52. This is to prevent Congress from "eviscerat[ing] the Seventh Amendment's guarantee . . . ." Id. Thus, this Court declared that Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be brought [in a Court of Equity]." Id. It is clear, then, that when a party in a private action makes a jury demand for a claim that is inherently legal, Congress cannot eliminate that party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in a court of equity.

C. The Two-Part *Terry/Tull* Test

The following year, this Court decided Teamsters v. Terry, 494 U.S. 558 (1990), reconfirming Tull, supra, and holding that the Seventh Amendment right to a trial by jury "extends to causes of action created by Congress." Id. at 564-65. Further relying on Tull, this Court held that to determine whether a litigant's Seventh Amendment right to a jury trial had attached, Courts must apply a two-part test. The Court must:

> "examine both the nature of the issues involved and the remedy sought. 'First, [the Court must] compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, [the Court

must] examine the remedy sought and determine whether it is legal or equitable in nature.'"

Id. at 565 (quoting Tull, supra, 481 U.S. at 417-418 (citations omitted)). The second inquiry is the more important one in this analysis. Id. 494 U.S. at 565.

Most recently, this Court, in Feltner v. Columbia Pictures Television, Inc., ___ U.S. ___, 118 S. Ct. 1279, 1998 U.S. LEXIS 2301 (March 31, 1998), ruled that a copyright claimant seeking "statutory damages" was entitled to trial by jury, even though the statute itself was silent on the jury trial issue. Id. at *15. The Court restated "the 'general rule' that monetary relief is legal," reaffirmed Tull, Granfinanciera, and Terry, and concluded that "the Seventh Amendment provides a right to a jury trial [in that matter] . . . ." Id. at *24.

The rulings of this Court in Tull, Granfinanciera, Terry, and Feltner, therefore, have at least made clear that Congress cannot defeat the Seventh Amendment right to a jury trial by statutory silence.

D. ERISA After *Firestone* and *Terry*

Prior to this Court's 1989 landmark decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), many courts denying the right to jury trials in ERISA cases reasoned that such trials were incompatible with the application of the standard of judicial review of plan administrators' actions which was then thought to apply to ERISA claims, the "arbitrary and capricious"

standard.[3] In Firestone, however, this Court reversed that trend by applying that a "*de novo*" standard of review to actions against administrators under ERISA, "regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest." Id. at 115. Thus, that earlier rationale used to deny jury trials no longer applies now that denial of benefits is subject to *de novo* review under Firestone, a standard that is compatible with a jury trial. See, e.g., Zimmerman v. Sloss Equipment, Inc., 72 F.3d 822, 829 (10th Cir. 1995).

Before this Court's decision in Firestone, every Circuit Court that examined the issue of the Constitutional right to a jury trial under ERISA had concluded that there was no such right.[4] In the wake of Firestone, and in light

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[3] See, e.g., Chilton v. Savannah Foods & Industries, Inc., 814 F.2d 620 (11th Cir. 1987); Brown v. Retirement Committee of Briggs & Stratton, 797 F.2d 521 (7th Cir.), cert. den. 479 U.S. 1094 (1986); Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir.), cert. den. 449 U.S. 1112 (1981); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980).

[4] See, e.g., Cox v. Keystone Carbon Co., 894 F.2d 647, 649-50 (3d Cir.), cert. denied, 498 U.S. 811 (1990); Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir.), cert. denied, 488 U.S. 826 (1988); Howard v. Parisian, Inc., 807 F.2d 1560, 1566-67 (11th Cir. 1987); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006-07 (4th Cir.

(continued...)

of this Court's recent Seventh Amendment decisions, however, most courts which have examined the issue have recognized that it is far from settled. See, e.g., Zimmerman, supra, 72 F.3d at 830 (holding that the issue of whether an ERISA plaintiff is entitled to a trial by jury was a "thorny" one, which it declined to address).

The Sixth Circuit, in its recent decision in Bittinger v. Tecumseh Products Company, 123 F.3d 877 (6th Cir. 1997), recognized that whether an ERISA plaintiff is entitled to a jury trial turns on whether the claim is best characterized as "legal" or "equitable" under the two-part Terry/Tull test. After determining that it was bound to apply this test, the Sixth Circuit determined that the facts did not warrant a jury trial since the claim therein was "analogous to an action to enforce a trust and hence clearly equitable in nature." Bittinger, 123 F.3d at 883. The Court, however, acknowledged that "some claims under ERISA—perhaps even claims under §502(a)(1)(B)—may carry with them a jury trial right . . . ." Id.

The Fifth Circuit reached the same conclusion in Borst v. Chevron Corp., 36 F.3d 1308 (5th Cir. 1994),

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[4](...continued)
1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); In re Vorpahl, 695 F.2d 318, 321-22 (8th Cir. 1982); and Wardle v. Central States S.E. & S.W. Areas Pension Fund, 627 F.2d 820, 829-30 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

cert. denied, 514 U.S. 1066 (1995). In Borst, the Court also applied the two part Terry/Tull test to plaintiff's ERISA claims, and concluded that the claim was "equitable in nature," since the plaintiffs' request was "for distribution of surplus assets" which the Court found to be "analogous to an action for disgorgement of improper profits." Id. at 1324. Accordingly, the Court affirmed the striking of the jury demand without directly confronting the Seventh Amendment issue. Id.

This application and analysis of the two part Terry/Tull test is implemented in many District Court ERISA decisions, perhaps the most recent of which is Adams v. Cyprus Amax Mineral Co., 954 F. Supp. 1470 (D. Co. 1997). In Adams, the Court reviewed this Court's holdings in Firestone and Terry and applied the two-part Terry/Tull test to determine, based on the nature of the action and the type of remedy sought, whether the plaintiff was entitled to a jury trial. Id. at 1476. The Court found the ERISA claim to be "legal" in nature and, therefore, that the plaintiffs had "a constitutional right to a jury trial". Id. at 1477.

Other District Courts which have come to the same conclusion include: Hulcher v. United Behavioral Systems, Inc., 919 F. Supp. 879, 883 (E.D. Va. 1995);[5] Vaughn v.

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[5] Denying defendant's motion to strike plaintiff's request for a jury trial and refusing to follow Berry v.

(continued...)

Owen Steel Company, Inc., 871 F. Supp. 247, 250 (D. S.Ca. 1994); Algie v. RCA Global Communication, Inc., 891 F. Supp. 870, 874 (S.D.N.Y. 1994), aff'd on other grounds, 60 F.3d 956 (2d Cir. 1995); Higginbotham v. Worth Publishers, Inc., 820 F. Supp. 48, 50 (D.P.R. 1993); McDonald v. Artcraft Elec. Supply Co., 774 F. Supp. 29, 34 (D.D.C. 1991); Steeples v. Time Ins. Co., 139 F.R.D. 688, 693-94 (N.D. Okla. 1991); Blue Cross & Blue Shield of Alabama v. Lewis, 753 F. Supp. 345, 348 (N.D. Ala. 1990); Rhodes v. Piggly Wiggly Alabama Distrib. Co., 741 F. Supp. 1542, 1545 (N.D. Ala. 1990); Gangitano v. NN Investors Life Ins. Co., Inc., 733 F. Supp. 342, 342-44 (S.D.Fla. 1990); Vicinanzo v. Brunschwig & Fils, Inc., 739 F. Supp. 882, 890-91 (S.D.N.Y. 1990).[6]

The only Court which has addressed this issue recently which still fails to apply this Court's two-part

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[5](...continued)
Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985), since Berry was decided prior to Firestone and because the Berry Court "did not conduct a Seventh Amendment analysis to determine whether or not there is a constitutional right to a jury trial in § 1132(a)(1)(B) actions." Hulcher, 919 F. Supp. at 883.

[6] Chief Judge Charles L. Brieant observed that "perhaps because the right to a jury trial on claims of legal entitlement is so obvious, ERISA makes no express provision for jury trials . . . ." 739 F. Supp. at 885.

Terry/Tull test to ERISA claims, and which denies jury trials in all ERISA claims, appears to be the Second Circuit. The prior decisions of that Court upon which it relied herein, DeFelice v. American Int'l Life Assurance Co. of New York, 112 F.3d 61, 64 (2d Cir. 1997) and Sullivan v. LTV Aerospace & Defense Co., 82 F.3d 1251 (2d Cir. 1996), although decided after Terry and Firestone, relied exclusively upon cases which predate both those decisions, and, like the decision appealed from herein, failed to consider the Seventh Amendment in light of Tull, Granfinanciera, or Terry. The Second Circuit, therefore, stands virtually alone in holding, as it did herein, unequivocally and without any Seventh Amendment analysis, that "there is no right to a jury trial in a suit brought to recover ERISA benefits." (A-14)

E. Tischmann was Entitled to a Jury Trial under the Two-Part *Terry/Tull* Test, Which The Second Circuit Failed to Apply

When the Terry/Tull two-part test is applied to this case, the result is readily apparent: just as actions seeking damages for breach of contract (monetary relief for common law legal claim) were tried before juries in courts of law in the 18th century England, so the Seventh Amendment requires that their modern-day counterparts be tried to juries today if either party desires. It is simply inconceivable that the Framers, who attached such importance to the right preserved by that Amendment,

would have countenanced the determination by a judge whether a plaintiff should be compensated in money damages for a defendant's breach of an agreement to pay what are, in essence, wages.

As this Court has explained, "an action for money damages was 'the traditional form of relief offered in the courts of law.'" Terry, 494 U.S. at 570-571. Thus, the Court will find an "exception to the general rule" that such an action is triable to a jury only if the damages have the "attributes" of an equitable remedy. Id. The Court has recognized only two such instances: purely restitutionary actions, such as actions for disgorgement of improper profits, and monetary awards that are "incidental to or intertwined with injunctive relief." Id. (quoting Tull, 481 U.S. at 424). Damages under §502(a)(1)(B) bear no resemblance to these equitable remedies.

Here, Tischmann's claims were for money damages only, as a common law breach of contract claim. Judge Kram, in her decision on defendant's summary judgment motion, dismissed all but two legal claims: one for breach of contract and one for violation of New York's Labor Law for failure to pay wages. (C-33)

Since plaintiff's cause of action was for common law breach of contract, one for which jury trials were traditionally guaranteed at common law, there is no question that the first part of the Terry/Tull test would have been satisfied here. Further, even when judicially converted into a claim for benefits under §502(a)(1)(B),

plaintiff's claim was still for money damages only. Accordingly, Tischmann's Seventh Amendment right to a trial by jury was implicated and the ruling of the jury should have been upheld. Terry, supra 494 U.S. at 565.

The Second Circuit's failure to apply the two-part test propounded by this Court, resulting in an inflexible rule that no jury trial is available for ERISA claims under any circumstances, is in direct conflict with decisions of this Court and stands in stark contrast to the rationale of other Circuit Courts in Bittinger, supra; and Borst, supra. The Second Circuit's failure to uphold the jury's verdict violated plaintiff's Constitutional right as guaranteed by the Seventh Amendment, and that decision, therefore, cannot be left to stand.

Point II

THIS COURT SHOULD SETTLE THE QUESTION OF WHETHER SECTION 502(a)(1)(B) OF ERISA PERMITS OR REQUIRES A JURY TRIAL IN ACTIONS FOR MONETARY DAMAGES FOR FAILURE TO PAY BENEFITS DUE.

A. ERISA is Silent on the Issue of Trial by Jury, But its History Suggests that Jury Trials are Available in Benefits Due Claims

In ascertaining whether a statutory claim is triable

to a jury, courts look principally to the procedural and remedial provisions of the statute. See, e.g., Teamsters v. Terry, supra, 494 U.S. at 559; Tull, supra, 481 U.S. at 414. The provisions of ERISA offer no direct guidance on the jury trial question, simply providing that

> "(a) . . . A civil action may be brought— (1) by a participant or beneficiary— . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ."

29 U.S.C. § 1132(a)(1)(B).

The structure of ERISA, however, indicates that Congress recognized a distinction between the trust and contract aspects of employee benefits law and, hence, between equitable and legal claims. Thus, for example, ERISA separately provides both for the establishment of a "trust instrument" (see 29 U.S.C. § 1103(a) and 29 U.S.C. §§ 1105(a)(1) & (c)(5)), and for the establishment of a benefit "plan instrument" (see 29 U.S.C. § 1102(a)); 29 U.S.C. §§ 1002(16)(A), 1015, 1024(a)(1)(B), 1105(c)(1), 2003(a). The "plan instrument" constitutes a contract for payment of benefits, whereas the "trust instrument" defines the fiduciary obligations of the administrator as trustee. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (ERISA intended "to protect contractually defined benefits"); Flint, ERISA: Jury Trial Mandated for Benefit Claims Action, 25 Loy. L.A. L. Rev. 361, 364 &

nn.224-32 (1992).

In short, the adoption of trust principles in ERISA is addressed to fiduciary responsibilities concerning the management of the trust (see, e.g., Firestone, supra, 489 U.S. at 110), and is designed "to raise the standard of fiduciary behavior." Flint, supra, 25 Loy. L.A. L. Rev. at 405. Those provisions do not directly govern claims for non-payment of benefits, and they should not be viewed as having the perverse effect of denying to plan participants their prior entitlement to the benefit of a jury trial.

B. ERISA's Legislative History

ERISA was intended to protect and expand upon then-existing procedural protections for employee benefit plan participants. Thus, the implication is strong that Congress did not intend that ERISA reduce or limit by depriving those participants of the option of a jury trial on benefit claims. Indeed, there is nothing in the legislative history to support the view that Congress intended to eliminate jury trials in cases where there would have been a right to jury under state law, or that Congress intended that ERISA deprive those participants of the option of a jury trial on benefit claims.

Although the legislative history of ERISA offers no explicit guidance on this question, the absence of a clear statement in the statute or legislative history does not compel the conclusion that Congress intended to deny a jury trial. See, e.g., Feltner, supra, 1998 U.S. LEXIS

2301 at *10-15 (holding that a copyright claim was subject to a jury trial, despite the fact that the statute itself contained no such right). Rather, "[w]here congressional intent on the subject of a jury trial is not clear from the statutory language, a court must look to the pre-statutory custom with respect to such actions." McDonald v. Artcraft Elect. Supply Co., 774 F. Supp. 29, 33 (D.D.C. 1991). At the very least, the existence of a clear-cut prior practice suggests that, absent a stated intention to depart from the *status quo*, Congress assumed that it would continue. See, e.g., Wardle v. Central States Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 829 (7th Cir. 1980). As a general matter, in reading statutes courts are to presume against implied repeals of common-law rules. See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952). Cf. Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986); United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976).

Past practice, however, is clear. Prior to ERISA, of course, "most courts viewed benefits-due lawsuits as contractual and hence most state courts did not use trust law for benefits due cases." See, e.g., Firestone, supra, 489 U.S. at 112; Flint, supra, 25 Loy. L.A. L. Rev. at 386. Since these benefits due claims were treated as sounding in contract, it generally followed that plaintiffs were entitled under state common law to a jury trial. See, e.g., Flint, supra; 25 Loy. L.A. L. Rev. at 401 n.212

(citing numerous state court cases).

Set against this backdrop, the legislative history of ERISA presents a positive indication that the statute impliedly makes a jury trial available for benefits-due claims. The ERISA statute contains a Congressional statement of purpose to "afford more protection to employees and their beneficiaries than existed under prior law." 29 U.S.C. § 1001. More specifically to the point, both Senate and House Committee reports stated

> "The intent of the Committee [in providing the benefits-due lawsuit] is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."

S. Rep. No. 127, 93d Cong., 2d Sess. 1, 35 (1973), in 1974 U.S.C.C.A.N. 4838, 4871; H.R. Rep. No. 533, 93d Cong., 2d Sess. 17 (1973), in 1974 U.S.C.C.A.N. 4639, 4655. These Congressional statements of intent confirm that ERISA was intended to protect and expand upon previously existing procedural protections for plan participants. Thus, the implication is strong that Congress did not intend that ERISA deprive those participants of the option of a jury trial on benefit claims. See, e.g., McKinnon v. Blue Cross-Blue Shield, 691 F. Supp. 1314, 1315 (N.D. Ala. 1988), aff'd, 874 F.2d 820 (11th Cir.

1989); Flint, supra, 25 Loy. L.A. L. Rev. at 399, n4.

Therefore, the Second Circuit was wrong in holding that ERISA does not provide for a jury trial under any circumstances, and this Court should grant a writ of certiorari to settle the question of whether Section 502(a)(1)(B) of the Employment Retirement Income Security Act ("ERISA") permits or requires a jury trial in actions for monetary damages for failure to pay benefits due.

C. Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to the Second Circuit to resolve the conflict between the Circuits and determine the unsettled Constitutional question of whether an ERISA claimant seeking money damages for claims sounding in common law breach of contract is entitled to the Seventh Amendment guarantee of trial by jury.

WHEREFORE, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari, reverse the Judgment of the Second Circuit, and uphold the jury verdict herein.

Respectfully submitted,
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APPENDIX A

Appendix A
Circuit Court Opinion

PETER TISCHMANN,
Plaintiff-Appellant/Cross-Appellee,
v.
ITT/SHERATON CORPORATION,
Defendant-Appellee/Cross-Appellant.

Docket Nos. 97-7624, 97-7712 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
1998 U.S. App. LEXIS 12102

February 13, 1998, Argued
June 10, 1998, Decided

PRIOR HISTORY: Appeal from a judgment of the United States District Court for the Southern District of New York (Michael H. Dolinger, Magistrate Judge) dismissing plaintiff's claim for severance benefits. We conclude that the complaint pleaded a claim for benefits under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA"), that plaintiff's state law claims were preempted, and that under ERISA plaintiff had no right to jury trial.

DISPOSITION: Affirmed.

COUNSEL: STEVEN G. ECKHAUS, New York, N.Y. (Jonathan C. Moore, Roger D. Olson and Marc A. Stadtmauer, Eckhaus & Olson, New York, N.Y., Of Counsel), for Plaintiff-Appellant/ Cross-Appellee.

PETER A. CROSS, New York, N.Y. (Catherine A. McCann, Jacob, Medinger & Finnegan, LLP, New York, N.Y., Of Counsel), for Defendant-Appellee/ Cross-Appellant.

JUDGES: Before JACOBS, LEVAL, and LAY*, Circuit Judges.

* Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION: LEVAL, Circuit Judge:

Plaintiff Peter Tischmann appeals from a judgment of the United States District Court for the Southern District of New York (Michael H. Dolinger, Magistrate Judge) dismissing Tischmann's claims against his former employer, defendant ITT/Sheraton Corporation ("ITT/Sheraton" or "Sheraton"). The complaint alleged that the defendant wrongfully failed to pay severance benefits as promised under a severance plan. The court concluded that the severance plan was an employee welfare benefit plan within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. and that, accordingly, Tischmann's state law claims were preempted and should be construed instead as a claim for

benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Because the claim was founded on ERISA, the court determined that plaintiff had no entitlement to jury trial. The court assessed the evidence and found that Tischmann had failed to prove his claims. We affirm.

BACKGROUND

Tischmann began working for defendant in 1972. In 1985, Sheraton named him general manager of the St. Regis Hotel in New York City. From December 1, 1986 through November 30, 1990, Tischmann had worked pursuant to a written employment contract. In 1989, the defendant decided to eliminate virtually all employment contracts with its executives. After his employment contract terminated in late 1990, Tischmann continued in his previous position without a written contract, as an "at will" employee. Following the elimination of employment contracts, ITT/Sheraton created plans to provide severance benefits for senior executives. Tischmann and approximately 20 other management employees were covered by one of these plans, the ITT Special Executive Severance Pay Plan ("the ITTSESPP" or "the plan").

The ITTSESPP provided, inter alia, that a covered executive would receive severance payments in an amount based on his previous salary if his employment was terminated involuntarily, unless the termination was "for cause." The payments would either be paid periodically in accordance with ITT/Sheraton's regular payroll schedule

or, if ITT/Sheraton elected, in a lump sum. The plan provided that employees receiving severance benefits would be subject to certain continuing obligations.

In early 1992, several of Tischmann's subordinates in the Human Resources Department of the St. Regis complained that Tischmann had sexually harassed them. After investigation, Sheraton officials determined that Tischmann had violated the company's sexual harassment policies. In March 1992, Sheraton terminated his employment. Because his termination was deemed "for cause," Sheraton declared Tischmann ineligible for benefits under the plan.

Tischmann brought this action in the United States District Court for the Southern District of New York, under diversity jurisdiction. Citing the law of New York as authority, the complaint sought reinstatement, compensatory and punitive damages, and attorneys' fees claiming (i) breach of an alleged contract of employment; (ii) breach of an implied covenant of good faith and fair dealing; (iii) intentional and negligent infliction of emotional distress; (iv) slander; (v) compelled self-publication defamation; (vi) entitlement to attorneys' fees and liquidated damages under New York Labor Law § 190 et seq.; and (vii) breach of the contractual promise to pay severance benefits. Tischmann claimed he had not sexually harassed his subordinates and was not fired "for cause," but was fired to save money, to deflect criticism

from stockholders with respect to the amount of compensation paid by Sheraton, and because his management style, age, and national origin did not reflect an attractive image. Tischmann sought trial by jury on all claims.

In April 1994, ITT/Sheraton moved for summary judgment on all counts. In an opinion entered April 10, 1995, Judge Shirley Wohl Kram granted summary judgment in favor of ITT/Sheraton on all counts except the severance benefits claim and the New York Labor Law claim. See Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1371 (S.D.N.Y. 1995). With respect to the severance benefits claim, citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987) and James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463 (2d Cir. 1993), Judge Kram concluded that the ITTSESPP was not a "plan" within the meaning of ERISA with the consequence that Tischmann's state law claim was not preempted. See Tischmann, 882 F. Supp. at 1368-69. Judge Kram also concluded that Tischmann had stated a viable claim under the New York Labor Law § 190. See id. at 1370.

The parties then consented to proceed to trial before a magistrate judge pursuant to 28 U.S.C. § 636(c), and the case was reassigned to Magistrate Judge Dolinger. Before trial, ITT/Sheraton asked the magistrate judge to reconsider Judge Kram's ruling that ERISA was inapplicable to the

claim for severance benefits. The defendant argued that, whereas a state law claim could be tried to a jury, Tischmann would have no right to a jury trial on a claim for ERISA benefits under this court's decision in Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1257-59 (2d Cir. 1996). The magistrate judge decided to take the question under advisement, and proceed to trial before a jury on the state law theories, holding open the possibility of making his own findings if he should subsequently determine that the claim for severance benefits was governed by ERISA.

At the conclusion of the trial, the jury returned a special verdict in favor of Tischmann. The jury found that ITT/Sheraton's termination of Tischmann was arbitrary or in bad faith, thus entitling him, under New York law, to severance pay in the amount of $ 364,000 plus interest. On the other hand, the jury found that ITT/Sheraton had not acted "willfully" in refusing to pay Tischmann severance benefits, thereby precluding Tischmann from recovering an award of attorneys' fees under New York Labor Law § 190.

Following the verdict, ITT/Sheraton renewed its motion for reconsideration of Judge Kram's decision on the applicability of ERISA, and moved for judgment as a matter of law. Magistrate Judge Dolinger found that reconsideration of Judge Kram's ruling was appropriate, partly because of new testimony adduced at trial regarding

the ITTSESPP and partly because of this court's intervening decision in Schonholz v. Long Island Jewish Medical Center, 87 F.3d 72 (2d Cir.), cert. denied, U.S. , 117 S. Ct. 511, 136 L. Ed. 2d 401 (1996). On reconsideration, the magistrate judge determined that the severance plan was an ERISA "plan," that Tischmann's state law claim for severance benefits was accordingly preempted, and that that claim should "therefore be construed as a claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B)." Based on Sullivan, the magistrate judge concluded, the merits of the ERISA claim should be decided by the court. Because the severance plan gave the plan administrator considerable discretion in determining benefits eligibility, the court found the decision that Tischmann was not entitled to benefits should be reviewed under an "arbitrary or capricious" standard. The court concluded that the denial of benefits was not arbitrary or capricious, and that Tischmann's claim under the New York Labor Law § 190 failed because of ERISA preemption or, alternatively, because the denial of benefits was justified.

Judgment dismissing Tischmann's complaint was entered, and this appeal followed. Tischmann's appeal focusses on two contentions, first that his state law claims were not preempted by ERISA, and second that, even under ERISA, he should have been accorded trial by jury.

DISCUSSION

I. Applicability of ERISA

Both sides agree that if the ITTSESPP is an "employee welfare benefit plan" within the meaning of ERISA, then Tischmann's state law claim for severance benefits is preempted by ERISA and should be construed as a claim for benefits under ERISA § 502(a)(1)(B). See 29 U.S.C. § 1144(a) (providing generally that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .").[1]

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[1] Tischmann does argue that three recent Supreme Court decisions evince a more restrictive view of the scope of ERISA preemption. See Boggs v. Boggs, ___ U.S. ___, 117 S. Ct. 1754 (1997); De Buono v. NYSA-ILA Med. and Clinical Serv. Fund, ___ U.S. ___, 117 S. Ct. 1747, 138 L. Ed. 2d 21 (1997); California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997). However, these cases concerned the issue when state laws are properly deemed to "relate to" conceded ERISA "plans." Hence, none bears directly on the definition of ERISA plans. Dillingham held that California's prevailing wage law, including a provision allowing for payment of lower-than-prevailing wages to participants in state-approved apprenticeship programs, was not preempted by ERISA since the California law neither made "reference to" nor had a "connection with" ERISA. ___ U.S. at ___, 117 S. Ct. at 837-42. Boggs held that ERISA preempted

(continued...)

Tischmann, however, contends the magistrate judge erred in concluding that the ITTSESPP is an ERISA-governed plan.[2]

First, Tischmann argues that the magistrate judge was bound, under the principle of "law of the case" to adhere to Judge Kram's prior determination that the ITTSESPP was an ERISA plan. Tischmann's argument fails for at least three reasons. First, "the [law of the case] doctrine 'is, at best, a discretionary doctrine, which does not constitute a limitation on the court's power'" but merely expresses a general reluctance, absent good cause, to reopen rulings that the parties have relied upon. Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir.), cert

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[1](...continued)
operation of Louisiana's community property law insofar as it allowed a predeceasing spouse to transfer through her will an interest in her husband's ERISA-governed benefits. ___ U.S. at ___, 117 S. Ct. at 1766-67. And De Buono held that ERISA did not preempt a New York state tax on gross receipts of health-care facilities, even where such facilities were operated by ERISA-governed funds. ___ U.S. at ___, 117 S. Ct. at 1752. We do not understand Tischmann to be arguing that these cases allow his claim for severance benefits to escape ERISA coverage even if it is an ERISA "plan."

[2] Tischmann does not contend that he is entitled to relief under the New York Labor Law if the ITTSESPP is an ERISA-governed plan.

denied, U.S. , 118 S. Ct. 365 (1997)(quoting United States v. Martinez, 987 F.2d 920, 923 (2d Cir. 1993)). Second, reconsideration of Judge Kram's decision was justified by this court's intervening decision in Schonholz, which provided further guidance regarding ERISA's application to severance plans. See Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (intervening change of controlling law justifies reconsideration of prior ruling). Third, it makes no difference on this appeal whether the magistrate judge acted in accord with the principle of law of the case. The issue on appeal is whether the ITTSESPP is an ERISA plan. We would need to pass on that question de novo, see Schonholz, 87 F.3d at 75, whether Magistrate Judge Dolinger had followed Judge Kram's ruling or made his own contrary determination. In either event, our job would be to determine, as a matter of law, whether the ITTSESPP is governed by ERISA.

With respect to this question, it is well established that "a program to pay severance benefits may constitute an 'employee welfare plan.'" James, 992 F.2d at 468. See generally 29 U.S.C. § 1002(1)(setting forth the definition of "employee welfare benefit plan"); Fort Halifax, 482 U.S. at 7 & n.5, 107 S. Ct. at 2215 & n.5 ("Severance benefits are included in ERISA")(citing 29 U.S.C. § 1002(1)(B)). Indeed, as we stated in Schonholz, "the term 'employee welfare benefit plan' has been held to apply to

most, but not all, employer undertakings or obligations to pay sevrance benefits." 87 F.3d at 75.

What is in dispute, as in Fort Halifax, James, and Schonholz, is whether the particular employer undertaking at issue -- here, the ITTSESPP -- is an ERISA "plan." "The terms 'employee benefit plan' and 'plan' are defined only tautologically in the statute. . . ." Fort Halifax, 482 U.S. at 8, 107 S. Ct. at 2216. However, "both the Supreme Court and this court have emphasized that ERISA applies only where such an undertaking or obligation requires the creation of an ongoing administrative program." Schonholz, 87 F.3d at 75. As explained in Fort Halifax, this principle flows from the policies underlying ERISA preemption: "Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations." 482 U.S. at 11, 107 S. Ct. at 2217. For example, tasks such as "determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements," would be difficult to perform if an employer were "subject to differing regulatory requirements in differing States." Id. at 9, 107 S. Ct. at 2216. But "this concern only arises . . . with respect to benefits whose provision by nature requires an

ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." Id. at 11-12, 107 S. Ct. at 2217.

Thus, in Fort Halifax, the Supreme Court held that ERISA did not preempt a Maine statute that required employers who relocated or terminated operations of a plant to provide a one-time severance payment to employees who had worked at the plant for at least three years. 482 U.S. at 3-5 & n.1, 107 S. Ct. at 2213-14 & n.1. The Court reasoned that the statute's imposition of one-time, contingent obligations on employers did not require the creation of plans:

> The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. . . . To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility. The theoretical possibility of a

> one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits.

Id. at 12, 107 S. Ct. at 2218 (footnotes omitted).

Similarly, in James, this court held that an employer had not created an employee benefit plan by virtue of promising, in light of a planned consolidation and accompanying workforce reduction, to pay employees who agreed to work until the end of the consolidation an amount equal to 60 days additional pay. The money would be paid following each employee's last day of work, and could be taken, at the employee's election, in either a lump-sum or bi-weekly installments. 992 F.2d at 464. Among other factors, we emphasized that the severance payments would "occur over a short time." Id. at 466. In addition, within this short time frame, the "need to make . . . simple arithmetical calculations" -- such as determining the amount of benefits payable to each employee and the appropriate deductions for social security taxes, health and medical benefits, and 401k plans -- "did not require the 'establish[ment of] a uniform administrative scheme.'" Id. at 467 (quoting Fort Halifax, 482 U.S. at 9, 107 S. Ct. at 2216)). Because the employer's undertaking did not "require an ongoing administrative employer program," it was not a plan, and the plaintiff's claim for benefits was not preempted. See id.

In contrast, in Schonholz, we determined that an

employer had created an employee benefit plan by virtue of its promise to pay severance benefits to discharged senior employees in amounts based upon each employee's length of employment and prospects for reemployment. 87 F.3d at 74, 76-77. Under the arrangement, an otherwise eligible employee would not be entitled to benefits if he failed to make a reasonable and good faith effort to obtain a new job comparable to his prior position. Id. at 74. Nor would an employee be entitled to benefits if he was terminated for illegal conduct or substantially deficient performance. See id. The plan contained no provision for its termination or amendment. See id.

In analyzing whether this undertaking constituted a plan, the Schonholz opinion looked to: (1) "whether the employer's undertaking or obligation requires managerial discretion in its administration"; (2) "whether a reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits"; and (3) "whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria." Id. at 76 (internal quotation marks and citations omitted). We did "not decide . . . which one or more of these factors will be determinative in every case" because we concluded that all favored the conclusion that a plan had been created. Id. at 76. Nor did we preclude the possibility that other factors might be relevant in a different factual setting. Cf. Simas v. Quaker Fabric Corp., 6 F.3d 849,

854 (1st Cir. 1993)("So long as Fort Halifax prescribes a definition based on the extent and complexity of administrative obligations, line drawing . . . is necessary and close cases will approach the line from both sides.").

Although the ITTSESPP presents a somewhat closer issue than the arrangement in Schonholz, we conclude that it nonetheless is an ERISA-governed plan. It is true that, in contrast to the Schonholz plan, the ITTSESPP provides that it is subject to termination or amendment by ITT/Sheraton. This provision weighs against the conclusion, under the second Schonholz factor, that a reasonable employee would perceive the plan as an "ongoing commitment." However, the termination right is not absolute; the plan provides that termination (or any amendment) may not "reduce or adversely affect" the severance benefits of any eligible employee "whose employment terminates within two years of the effective date" of plan termination (or amendment).

Moreover, other factors weigh in favor of viewing the ITTSESPP as an "ongoing," though not necessarily limitless, commitment to pay benefits. Of particular significance, "unlike the employer's obligation in Fort Halifax and the promise in James, the [ITTSESPP is] not limited either to a single payment or to a short span of time upon a plant or office closing." Schonholz, 87 F.3d at 76. Rather, the plan is designed to pay benefits when each covered executive leaves ITT/Sheraton; these departures might well be expected to occur over a protracted period of

time. Cf. Fort Halifax, 482 U.S. at 18 n.10, 107 S. Ct. at 2221 n.10 (noting, in discussing this court's opinion in Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), aff'd mem., 477 U.S. 901, 106 S. Ct. 3267 (1986) that "a commitment to pay severance benefits to employees as each person left employment" created "the need for an administrative scheme to pay these benefits on an ongoing basis.").

Two other provisions further suggest that the ITTSESPP contemplates an ongoing relationship between ITT/Sheraton, as plan administrator, and covered employees. First, P 5 of the plan states that "If an Executive is receiving [benefits], the Executive must continue to be available to render the Company reasonable assistance, consistent with the level of the Executive's prior position with the Company, at times and locations that are mutually acceptable." Second, P 9 of the plan provides that a recipient will lose entitlement to benefits for failure to comply with specified standards of conduct during the period of receipt of benefits.

In response, Tischmann points to the fact that ITT/Sheraton reserved the right to pay an employee all his remaining severance benefits "in the form of a discounted lump sum." This provision merely allows ITT/Sheraton, with respect to any given recipient, to transform its continuing obligation into a one-time payment. It does not mean that ITT/Sheraton has not made an "ongoing"

commitment to pay benefits -- whether in the form of periodic or lump-sum payments -- to covered employees in the event their employment is terminated. We see no reason to conclude that the right to pay benefits in lump-sum form takes a severance plan outside of ERISA coverage. Cf. Fort Halifax, 482 U.S. at 14 n.9, 107 S. Ct. at 2219 n.9 (noting that "while death benefits may represent a one-time payment from the perspective of the beneficiaries, the employer clearly foresees the need to make regular payments to survivors on an ongoing basis. The ongoing, predictable nature of this obligation therefore creates the need for an administrative scheme to process claims and pay out benefits, whether those benefits are received by beneficiaries in a lump sum or on a periodic basis."). We therefore conclude that despite the company's limited right of termination, the ITTSESPP is reasonably perceived as an ongoing benefits commitment.

Our conclusion that ERISA applies is bolstered by consideration of the remaining Schonholz factors, since the ITTSESPP clearly contemplates application of significant managerial discretion, and case-by-case analysis of each termination, by ITT/Sheraton. Of direct relevance to Tischmann's case, ITT/Sheraton is required under the plan to examine the circumstances of each covered employee's termination and to determine whether it was "for cause";

if so, the employee is rendered ineligible for benefits.[3] Cf. Schonholz, 87 F.3d at 76 (noting that the employer was required to determine, inter alia, "whether the employee was involuntarily terminated, and thus qualified for the Severance Plan [and] whether the termination was for either illegal conduct or substantially deficient performance."); Simas, 6 F.3d at 853 (concluding that an ERISA plan had been created based in part on the necessity of determining whether eligible employees had been discharged "for cause".).

In addition, under P 9 of the plan, referred to above, ITT/Sheraton is not obliged to continue providing benefits if an employee receiving benefits:

> (i) engages in any activity which is inimical to the best interests of the Company; (ii) disparages the Company; (iii) fails to comply with any Company Covenant Against Disclosure and Assignment of Rights to Intellectual Property; (iv) without ITT's prior consent, induces any employees of the Company to leave their Company employment; (v)

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[3] Under the plan an employee also becomes ineligible for benefits if the subsidiary or division of the company for which he works is divested or sold and he either accepts employment with the purchaser or "refuses employment . . . with the purchaser on terms and conditions substantially comparable to those in effect immediately preceding the sale or divestiture."

> without ITT's prior consent, engages in, becomes affiliated with, or becomes employed by any business competitive with the Company; or (vi) fails to comply with applicable provisions of the ITT Code of Conduct or applicable ITT Subsidiary Code or policies. . . .

Similarly, pursuant to P 5 of the plan, quoted above, a recipient of benefits is required "to be available" to render services to ITT/Sheraton. In order to invoke this provision, ITT/Sheraton would have to determine what constitutes "reasonable assistance, consistent with the level of the Executive's prior position" and would also have to "take into account any other commitments which the Executive may have." By its terms, then, the plan's benefits structure incorporates numerous context-sensitive judgments, requiring managerial discretion on a continuing, individualized basis.

We agree with Magistrate Judge Dolinger's determination that the ITTSESPP is an employee benefit plan wihin the meaning of ERISA.[4]

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[4] In his reply brief to this court, Tischmann points out that ITTSESPP benefits are funded through ITT/Sheraton's general assets, and that in Dillingham, the Supreme Court stated that "an employee benefit program not funded through a separate fund is not an ERISA plan." ___ U.S. at ___, 117 S. Ct. at 838. But see Fort Halifax, 482 U.S.

(continued...)

II. Entitlement to jury trial

Tischmann argues that, even if ERISA governed his claim for severance benefits, he was entitled to a jury trial. This contention is without merit. In Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1258-59 (2d Cir. 1996) we held that "there is no right to a jury trial in a suit brought to recover ERISA benefits." Tischmann argues that in Schonholz, decided shortly after Sullivan, a panel of this Court seemed to contemplate that, on remand,

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[4](...continued)
at 7 n.5, 107 S. Ct. at 2215 n.5 ("Section 1002(1)(B) has been construed to include severance benefits paid out of general assets, as well as out of a trust fund.") (citing, inter alia, Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), aff'd mem., 477 U.S. 901, 106 S. Ct. 3267 (1986)); id. at 17, 107 S. Ct. at 2220 (noting that "cases holding that a plan that pays severance benefits out of general assets is an ERISA plan" are "completely consistent with our analysis"). Because Tischmann did not raise the argument regarding the funding status of the plan until his reply brief, we consider it waived. See United States v. Gabriel, 125 F.3d 89, 100 n.6 (2d Cir. 1997)(finding an argument raised for the first time in reply brief to be waived); Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1071 n.1 (2d Cir. 1997) (same; appellant's "failure to raise the issue on appeal in its initial brief deprived [appellee] of the opportunity to dispute the question and deprived the court of the benefit of both sides' briefing."), vacated on other grounds, 115 F.3d at 1082.

the plaintiff's claim for ERISA benefits would be tried to a jury. See Schonholz, 87 F.3d at 79-80. The Schonholz passages are clearly dicta. Moreover, in DeFelice v. American Int'l Life Assurance Co. of New York, 112 F.3d 61, 64 (2d Cir. 1997), we reaffirmed that "Sullivan made clear that cases involving ERISA benefits are inherently equitable in nature, not contractual, and that no right to jury trial attaches to such claims." Accordingly, Tischmann was not entitled to jury trial.[5]

CONCLUSION The judgment is affirmed.

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[5] Given our disposition, we need not address the arguments raised by ITT/Sheraton on its cross-appeal.

APPENDIX B

Appendix B
District Court Opinion (Magistrate Judge Dolinger)

PETER TISCHMANN, Plaintiff,
-against-
ITT/SHERATON CORPORATION, Defendant.

92 Civ. 2505 (SWK)(MHD)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
1997 U.S. Dist. LEXIS 5283

April 18, 1997, Decided
April 22, 1997, FILED

DISPOSITION: Defendant's Rule 50 request to set aside jury verdict for insufficiency of evidence denied. Defendant's request to reconsider status of ITTSESPP as ERISA plan granted. Complaint dismissed.

COUNSEL: For PETER TISCHMANN, plaintiff: Steven G. Eckhaus, Eckhaus & Olson, New York, NY. Jonathan C. Moore, Esq., New York, NY.

For ITT/SHERATON CORPORATION, defendant: Peter A. Cross, Jacob, Medinger & Finnegan, New York, NY.

JUDGES: MICHAEL H. DOLINGER,
UNITED STATES MAGISTRATE JUDGE

OPINION: MEMORANDUM AND ORDER
MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

In July 1985 ITT/Sheraton Corporation hired Peter Tischmann as the general manager of its St. Regis Sheraton Hotel ("St. Regis"). On March 12, 1992, ITT/Sheraton terminated Tischmann's employment "for cause," assertedly because he had sexually harassed two female employees. Because Tischmann's termination was "for cause," ITT/Sheraton refused to pay him severance benefits under the ITT Special Executive Severance Pay Plan ("the ITTSESPP"). Tischmann denied all accusations of sexual harassment and commenced this action to recover severance benefits in 1992.

Following a twelve-day trial, a jury returned a special verdict finding that ITT/Sheraton's decision to terminate Tischmann for cause was arbitrary or in bad faith. If enforced, that verdict would entitle him to severance pay in the amount of $ 364,000 plus interest.[1] In the wake of this verdict, defendants have moved under Fed. R. Civ. P. 50 for judgment as a matter of law, alleging an insufficient evidentiary basis for the verdict. Defendant also asks this court to reconsider a prior

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[1] The jury also found that ITT/Sheraton had not acted willfully, thus precluding an award of attorney's fees or liquidated damages under N.Y. Labor Law § 190.

determination by the district court that the ITTSESPP constituted an ERISA plan and to grant judgment or a new trial accordingly.

For the reasons described below, defendant's Rule 50 request to set aside the verdict for lack of a sufficient evidentiary basis is denied. Defendant's request to reconsider the ITTSESPP's status as an ERISA plan is granted. Because we find that the ITTSESPP is an ERISA plan, we are required independently to assess the evidence in this case. Based on that assessment we uphold the decision of ITT/Sheraton to terminate plaintiff's employment for cause and deny him severance under the ITTSESPP.

FACTUAL BACKGROUND

A. Procedural History

On March 9, 1993, plaintiff filed an amended complaint in this action. He sought reinstatement, compensatory and punitive damages, costs and attorneys fees from his former employer, ITT/Sheraton.

At the time of plaintiff's termination on March 12, 1992, he was vice president and managing director of the St. Regis Hotel in New York. (Tr. at 71, 251-52, 311; Pl.'s Ex. 40). Plaintiff alleged that ITT/Sheraton's stated reason for discharging him -- that he had sexually harassed at least two female employees -- was pretextual and that, in fact, ITT/Sheraton had terminated him "to (1) save money by reducing its workforce; (2) mislead Sheraton's

stockholders and the financial community [who had allegedly criticized large executive compensation packages]; and (3) oust an individual whose management style, age and national origin did not project the proper business image." See Amended Complaint at PP 21, 22, 24-27. See also Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358, 1363 (S.D.N.Y. 1995). The complaint also alleged that plaintiff had been terminated as a result of his failure to meet projected profit margins and because of petty jealousy. Amended Compl. at PP 23, 28.

ITT/Sheraton moved before the Honorable Shirley Wohl Kram, to whom this case was then assigned, for summary judgment dismissing the amended complaint. Judge Kram dismissed all of plaintiff's claims except those for breach of promise to pay severance benefits and a claim under section 190 of the New York Labor Law for attorneys' fees and liquidated damages equal to 25 percent of the total amount of severance found to be due.[2] Judge Kram also held that the severance pay plan at issue, the ITTSESPP, was not within the scope of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA"). See Tischmann, 882 F. Supp. at 1369.

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[2] Plaintiff would only prevail on the Labor Law claim if defendant's failure to pay severance benefits was found to be "willful." N.Y. Labor Law § 190 (McKinneys 1996).

On March 13, 1996, the parties consented under 28 U.S.C. § 636(c) to proceed to trial before this court. On the eve of the scheduled trial, the defendants informally requested, in light of the Second Circuit's elimination of the jury-trial right in suits brought to recover ERISA benefits, see Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251 (2d Cir. 1996), that we reconsider Judge Kram's ruling that the ITTSESPP was not an ERISA plan. With the agreement of the parties, we deferred that issue until after the trial, inviting defendant to move formally at that time and agreeing to issue bench findings if necessary. The jury trial commenced on September 30, 1996. On October 15, 1996, at the close of evidence but before jury deliberations commenced, ITT/Sheraton moved for judgment as a matter of law on the ground that plaintiff had presented legally insufficient evidence that ITT/Sheraton's decision to fire plaintiff and deny him severance benefits had been arbitrary or in bad faith. (Tr. at 1656). We reserved decision and took the motion under advisement. (Tr. at 1658).

The jury was asked to decide whether plaintiff had proven that ITT/Sheraton's decision to fire him for cause had been arbitrary or in bad faith. See Jury Verdict Form. If the jurors so found, they were further asked to determine whether the plaintiff had proven that ITT/Sheraton's decision to deny severance pay had been "willful." Id. On October 17, 1996, the jury returned a verdict in favor of

plaintiff on the question of severance benefits and in favor of defendant on the question of willful denial of benefits.

Following the jury's verdict, ITT/Sheraton renewed its motion for judgment as a matter of law and for reconsideration of Judge Kram's decision with respect to the applicability of ERISA to the ITTSESPP. (Tr. at 1895-97). We suspended entry of judgment pending decision of those motions (Tr. at 1896), to which we now turn.

B. The ITT/Sheraton Special Executive Severance Pay Plan

On December 12, 1989, Sheraton adopted an official policy to cease the use of employment contracts and to replace such contracts with a formal severance pay policy. (Tr. at 1421-22; Jt. Ex. 6). This severance pay policy was intended "to ensure more consistent and equitable treatment in the case of involuntary termination at the company's initiative." (Jt. Ex. 6). The ITTSESPP was thus created to provide severance benefits coverage for the roughly twenty employees who had previously had employment contracts. (Tr. at 1422).[3] Peter Tischmann was one such employee.

Under the terms of the ITTSESPP, covered employees whose employment was terminated under certain

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[3] This plan was "virtually identical" to the plan provided to other senior ITT executives. (Id.).

circumstances or whose employment terminated within two years after a "Change in Control" event were entitled to severance pay equivalent to two years salary.[4] (Jt. Ex. 7 at P 1). The ITTSESPP defined the method under which payments would be made. Executives terminated for reasons other than "cause," were to be compensated "in the form of periodic payments according to the regular payroll schedule . . . provided that ITT reserves the right at any time to pay the remaining severance pay in the form of a discounted lump sum." (Id. at P 5). Executives terminated due to a change-in-control event could elect to receive periodic payments or a lump sum, but ITT forfeited the right to insist on a lump-sum payment. Executives terminated "for cause" were explicitly excluded from receiving severance benefits. (Tr. at 138-40; Jt. Ex. 7 at P

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[4] The ITTSESPP defined a "Change of Control Event" as the sale of twenty percent or more of the corporation's outstanding common stock, a tender offer of fifteen percent or more of the outstanding common stock, a consolidation or merger, or a change in the majority of the Board of Directors in a one-year period. (Jt. Ex. 7 at App. A). None of these events is at issue here.

The ITTSESPP was amended on June 11, 1991, to delete all references to a change-in-control event. However, those amendments did not take effect for covered executives until June 11, 1993 and in any event are not at issue in this case. (Jt. Ex. 7 at p. 6).

3). The text of the plan did not define "for cause."

The ITTSESPP further provided that payments could be discontinued in the event of specified misconduct by the former employee even after severance payments had begun. (Jt. Ex. 7 at P 9). To this extent, ITT was required to monitor former employees receiving periodic severance payments (or "salary continuation") to determine whether, among other things, the employee had engaged in activities "inimical to the best interests of [ITT]" or had "failed to comply with applicable ITT Corporate Policies or any applicable ITT Subsidiary Code or policies." (Id.).

The ITTSESPP designated the ITT Corporation as the plan administrator. Moreover, it vested the administrator with the "exclusive right to interpret, . . . adopt any rules and regulations . . . and decide any and all matters arising under" the plan. (Tr. at 1423; Jt. Ex. 7 at P 12).

At trial, Ralph Pausig, senior vice president and director of administration for the ITT Corporation, testified regarding ITT's administrative burden in carrying out the ITTSESPP. These duties, according to Pausig, included determining whether cause existed for the termination of an affected employee, providing scheduled or lump-sum payments and determining whether other benefits would apply. (Tr. at 1424).

ANALYSIS

Defendant first moves under Fed. R. Civ. P. 50 to

set aside the jury verdict and dismiss the amended complaint, alleging an insufficient evidentiary basis for plaintiff's claim. Alternatively, defendant asks this court to reconsider a prior determination by the district court that the ITTSESPP did not constitute an ERISA plan, and, if ERISA applies, to vacate the jury verdict and make its own factual findings on the basis of the trial evidence. We address each argument separately.

I. Insufficiency of the Evidence[5]

Defendant first argues that plaintiff failed to present evidence at trial that was legally sufficient to sustain the jury verdict. We disagree.

Under Fed. R. Civ. P. 50, the court may overturn a jury verdict only if "1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or 2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 132 (2d Cir. 1986). See also Dailey v. Societe Generale, 108 F.3d 451, 1997 WL 92052, at(2d Cir. 1997); United

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[5] Because we grant the balance of defendant's motion, we need not address this aspect of the motion. Nonetheless, in view of the possibility of an appeal from our decision, we provide the following analysis in order to avoid any additional proceedings in this court.

States v. Merritt Meridian Constr. Corp., 95 F.3d 153, 165 (2d Cir. 1996). The trial court must be convinced that "the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice." Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)(citing Mallis, 717 F.2d 683, 691 (2d Cir. 1983)). Defendant has failed to meet this very heavy burden.

As presented to the jury, plaintiff's claim was for common-law breach of contract, based on the contention that defendant had violated the applicable standards for denying severance benefits under its plan. That plan required payment of benefits to plaintiff unless he was terminated "for cause." Under governing New York law, the determination as to whether a termination was for cause requires substantial deference to the employer's good-faith decision, see, e.g., Gehrhardt v. General Motors Corp., 581 F.2d 7, 12 (2d Cir. 1978); Gitelson v. DuPont, 17 N.Y.2d 46, 49, 268 N.Y.S.2d 11, 12, 215 N.E.2d 336 (1966), and thus the jury was called upon to find whether ITT/Sheraton's decision was "arbitrary or in bad faith." (Jury Verdict Form at # 1).

We conclude that plaintiff presented sufficient, albeit thin, evidence for a reasonable trier of fact to have found that the decision of ITT/Sheraton to terminate plaintiff for cause was arbitrary or in bad faith. At trial, plaintiff suggested several motives on the part of Sheraton for terminating him. For example, plaintiff provided

evidence arguably suggesting some dissatisfaction with his job performance (Pl.'s Ex. 7) and much documentation of an extended dispute over plaintiff's large benefits package. (Tr. at 1100, 1102-03, 1471, 1474-75, 1477-78, 1517; Jt. Exs. 33, 42; Def.'s Ex. CT). The record also contains some evidence suggesting pique by one or more company executives over plaintiff's inclination towards extensive and expensive renovation of the hotel's physical facilities. (Tr. at 145; Pl.'s Ex. 23).

Plaintiff also points to several corporate memoranda dating from October 1991 that could be read as suggesting a pre-existing decision to replace him as a cost-saving measure. (Jt. Exs. 2-3; Pl.'s Ex. 48). Finally, plaintiff offered some evidence arguably suggesting that a few other ITT/Sheraton employees accused of sexual harassment had been treated more leniently that he. (Tr. at 960-67; Pl.'s Ex. 49).

Based on this evidence, a reasonable jury could have concluded that Sheraton's explanation for its decision to fire plaintiff was pretextual. Accordingly, if the contract claim is not preempted by ERISA, the verdict must stand.[6]

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[6] In a further effort to challenge the verdict, defendant now takes issue with the wording of some of the jury instructions. Defendant contends that the instruction regarding the deference to be accorded an employer's good-faith decisions and the court's subsequent clarification

(continued...)

II. Defendant's Motion to Reconsider the ERISA Question

Defendant next argues that grounds exist for reconsideration of Judge Kram's holding that the ITTSESPP is not an ERISA plan. If correct, this arguments leads to the conclusion that the plaintiff's breach-of-contract claim is preempted by ERISA and must therefore be construed as a claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B). This in turn would mean that the claim is one for the court to decide, and the jury's verdict must therefore be treated as no more than advisory in nature. We agree with defendant's contention.

A. Law of the Case

The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Sagendorf-Teal v. County of Rensselaer, 100 F.3d 270, 276 (2d Cir. 1996). See also Doctor's Assoc., Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir. 1997); DiLaura v. Power Auth. of New York, 982 F.2d 73, 76 (2d Cir. 1992); In re PCH Assocs, 949 F.2d 585, 592 (2d Cir. 1991). That principle is mandatory for the district court when an appellate court has ruled on a matter of law.

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[6](...continued)
of this instruction so confused the jury as to require a new trial. These objections are baseless.

See, e.g., United States v. Minicone, 994 F.2d 86, 89 (2d Cir. 1993) (quoting United States v. Uccio, 940 F.2d 753, 757 (2d Cir. 1991)). See also DiLaura 982 F.2d at 76; 18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, P 134.20 at 134-44 (3rd ed. 1997).

The rule is discretionary, however, for a court that is considering whether to revisit its own decision or the decision of a sister court prior to final judgment. See, e.g., Sagendorf-Teal, 100 F.3d at 276; Lewis v. Whelan, 99 F.3d 542, 545 (2d Cir. 1996); DiLaura, 982 F.2d at 76-77; United States v. Uccio, 940 F.2d at 758 (quoting Arizona v. California, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983)); 18 MOORE'S FEDERAL PRACTICE, P 134.21 at 134-46 to 134-47 and P 134.22[1][C] at 134-50 to 134-51 (noting that rulings by different judges of the same court are not immune from re-examination). Similar discretion is granted to magistrate judges in cases where both parties have consented to proceed under 28 U.S.C. § 636(c). See, e.g., Cooper v. O.A. Brookshire, 70 F.3d 377, 378 n.6 (5th Cir. 1995); Steinborn v. Daiwa Securities America Inc., 1995 U.S. Dist. LEXIS 19165, 1995 WL 761286, atn. 1 (S.D.N.Y. Dec. 26, 1995).

The principal grounds justifying reconsideration of a prior decision include the discovery of new evidence, an intervening change of controlling law or "the need to correct a clear error or prevent manifest injustice." Virgin

Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.), cert. denied, 506 U.S. 820, 113 S. Ct. 67, 121 L. Ed. 2d 34 (1992). See also Doctor's Assoc., Inc., 107 F.3d at 131.

In this case, these considerations justify reconsidering the ERISA question. We note here that a bit of new evidence regarding the administrative scheme of the ITTSESPP was adduced at trial in the form of testimony from Ralph Pausig. More significantly, in the period since Judge Kram's ruling, the Second Circuit has followed the lead of several other circuits in clarifying the circumstances that qualify a severance plan as coming within ERISA in circumstances very similar to those at issue here. See Schonholz v. Long Island Jewish Medical Ctr., 87 F.3d 72, 76 (2d Cir.), cert. denied, 136 L. Ed. 2d 401, 117 S. Ct. 511 (1996). Accord, Simas v. Quaker Fabric Corp., 6 F.3d 849, 854 (1st Cir. 1993); Bogue v. Ampex Corp., 976 F.2d 1319, 1322-23 (9th Cir. 1992), cert. denied, 507 U.S. 1031, 123 L. Ed. 2d 471, 113 S. Ct. 1847 (1993). We also note that a reexamination of the ERISA issue may work here to conserve judicial resources. If we refused to reconsider the issue and the Second Circuit subsequently determined that the ITTSESPP is an ERISA plan, the Circuit would presumably remand for consideration by this court of the ERISA claim. See, e.g., Whitney v. Empire Blue Cross and Blue Shield, 106 F.3d 475, 477-78 (2d Cir. 1997); Sullivan, 82 F.3d at 1261. This step may be avoided

by revisiting the question of ERISA coverage at this stage.

In light of these considerations, we conclude that reconsideration of the ITTSESPP's possible status as an ERISA plan is warranted.

B. ERISA Coverage

Defendant asserts that the ITTSESPP constitutes a "plan" within the meaning of ERISA. We conclude that defendant is correct.

"ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." Massachusetts v. Morash, 490 U.S. 107, 112, 104 L. Ed. 2d 98, 109 S. Ct. 1668 (1989). ERISA governs employee welfare benefit plans, which are defined as plans that pays benefits described in 29 U.S.C. § 186(c). Section 186(c) includes severance or similar benefits. Id. at 113. Plaintiff's claim thus addresses a benefit plan potentially covered by ERISA.

To be covered by ERISA, however, a plan must utilize an "administrative scheme." The starting point for any such inquiry is the Supreme Court's decision in Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987). In that case, the Supreme Court examined the provisions of a state statute requiring certain employers to pay severance benefits to a particular class of employees upon the closing of a plant. The Court held that ERISA did not preempt the statute "because the statute

neither establishes, nor requires an employer to maintain an employee welfare benefit plan under the federal statute." Id. at 6.

In discussing the concerns propelling ERISA preemption, the Court stated that:

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Id. at 11-12 (emphasis added).

The Court continued that:

> The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on

> the occurrence of a single contingency that may never materialize. The employer may well never have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over the employer has further responsibility. The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits.

Id. at 12 (emphasis added).

The Second Circuit has similarly held that an employer's decision to provide a lump-sum severance payment upon an employee's termination did not, by itself, constitute an ERISA plan and thus did not preempt state law. James v. Fleet/Norstar Financial Group. Inc., 992 F.2d 463, 466 (2d Cir. 1993). James involved a promise by the employer to provide sixty days of pay following the last day of work to employees who remained on the job until the end of an internal consolidation. Id. at 464. Focusing on the language from Fort Halifax regarding one-time, lump-sum payments and the contingent nature of such obligations, the court rejected the argument that calculating termination dates, eligibility, and deductions for

taxes and other benefits required the "establishment of a uniform administrative scheme." Id. at 467.

Despite the guiding language in Fort Halifax and James, courts have yet to formulate a precise test for deciding which employer obligations and undertakings constitute an ERISA administrative scheme. See, e.g., Schonholz, 87 F.3d at 76; Belanger v. Wyman-Gordon Co., 71 F.3d 451, 455 (1st Cir. 1995); Simas, 6 F.3d at 854. The need to make simple arithmetical calculations clearly does not suffice to transform a severance pay program into an ERISA plan. See, e.g., Schonholz, 87 F.3d at 76; James, 992 F.2d at 467. To this extent, we are in agreement with Judge Kram's determination on summary judgment. According to Judge Kram, the numerical calculations involved in the determination of severance benefits under the ITTSESPP did not "require the establishment of a '"uniform administrative scheme"' [with] '"a set of standard procedures,"'" as described in Fort Halifax and James. Id. (cites omitted). Judge Kram viewed Fort Halifax and James as controlling and held that the ITTSESPP did "not require an ongoing administrative program" and instead "envisioned payments pursuant to a 'regular payroll schedule,' or, if Sheraton chooses, in a 'discounted lump sum.'" Tischmann, 882 F. Supp. at 1369.

In recent years, however, the federal courts have enumerated other factors as potentially determinative in identifying a severance plan as governed by ERISA. One

such factor is the reservation in the plan of managerial discretion, particularly in the form of a requirement that the administrator apply subjective criteria to determine eligibility for benefits. See, e.g., Schonholz, 87 F.3d at 75; James, 992 F.2d at 468; Bogue, 976 F.2d at 1322-23; Weiss v. Nat'l Westminster Bank Corp., 923 F. Supp. 381, 383 (E.D.N.Y. 1996); Middleton v. Philadelphia Elec. Co., 850 F. Supp. 348, 351-52 (E.D. Pa. 1994).

Typical of these decisions is Bogue v. Ampex Corp., 976 F.2d at 1321-23, in which the Ninth Circuit determined that a severance pay program was an ERISA plan even though it remained in effect for only a limited time, would have only a one-time application to any affected employee and was contingent on the occurrence of certain events. Id. at 1322. The plan in Bogue involved a one-time offer of severance to certain executives, contingent on (1) the sale of the subsidiary for which they worked, and (2) the absence of any offer by the parent company or the buyer of "substantially equivalent employment."[7] According to the court, the requirement that the administrator determine whether a former employee's work was "substantially equivalent" constituted "enough ongoing, particularized, administrative,

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[7] "Substantially equivalent employment" was defined in the plan as "a job that included responsibilities similar" to those done while employed by the defendant. Id. at 1321.

discretionary analysis to make the program" an ERISA plan, as the program could not be administered with "the unthinking, one-time, nondiscretionary application of the plan administrators in Fort Halifax." Id. at 1323.

The First Circuit reached the same result in the case of a plan that even more closely resembled defendant's plan in this case. In Simas v. Quaker Fabric Corp., 6 F.3d at 853, employees discharged after a corporate takeover sued the control transferee for severance pay under a Massachusetts statute requiring such pay for employees who lose their jobs in corporate takeovers. As a condition of payment, employees were required to meet the eligibility standards for unemployment compensation insurance -- in other words, they could not have been fired "for cause." Id. at 853. The court held that the required determinations by the employer as to whether an employee had been fired "for cause" involved the sort of managerial discretion that signalled an ERISA administrative scheme. It therefore held the statute to be preempted by ERISA. Id.

Finally, and most significantly for this case, the Second Circuit last year held that the determination whether an employee has been fired "for cause" involves the kind of managerial discretion that is the hallmark of an ERISA plan.[8] In Schonholz v. Long Island Jewish Medical Ctr.,

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[8] This result was not a complete surprise. We note (continued...)

87 F.3d at 74, the Second Circuit examined a severance plan under which employees were to be deemed ineligible if terminated for illegal conduct or "substantially deficient performance." Id. The plan also conditioned payment of severance on an employee's display of reasonable and good faith efforts to obtain a position "commensurate with his former level of responsibility." Id. The court held that such determinations regarding eligibility "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria," making the program an ERISA plan. Id. at 76. See also Weiss, 923 F. Supp. at 383.

Application of these standards in our case compels the conclusion that the ITT/Sheraton plan comes within the scope of ERISA. The ITTSESPP provides that terminated executives "shall be provided with severance pay . . . except where the executive is terminated for cause . . . . " (Jt. Ex. 7 at P 3). This requirement triggers a case-by-case

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[8](...continued)
that prior to Schonholz, the Second Circuit had cited the Ninth Circuit's decision in Bogue with apparent approval. Thus, in James the court observed that the "simple arithmetical calculations and clerical determination that [the employer] was required to make to ascertain each employee's severance pay was a 'far cry' from the 'ongoing, particularized, administrative, discretionary analysis' required of the employer under the program involved in Bogue." 992 F.2d at 468.

assessment by the plan administrator of a host of discrete factual matters.

For example, in this case the administrator had to determine whether the conduct of Mr. Tischmann amounted to sexual harassment under the corporate guidelines. These guidelines were memorialized in an official document known as the "Code of Corporate Conduct" ("the Code"). (Jt. Ex. 57). The Code stated that "sexual harassment . . . will not be tolerated within the ITT System. You are responsible for taking measures designed to ensure that no one under your supervision is subjected to sexual harassment in any form." (Id. at 14). ITT Corporation fleshed out this general policy with a guide (see Def.'s Ex. M), and a series of training materials designed to apprise managers of what types of behavior constituted sexual harassment. (See Def.'s Ex. P). ITT further provided all its general managers with an "Outline of Sexual Harassment Definitions, Prevention and Complaints." (Jt. Ex. 1). This document, identified as required reading, reminded general managers of ITT's strict policy against sexual harassment and provided criteria applicable to evaluating evidence of such harassment. (Id.). Of necessity, however, the guidelines were couched in fairly general terms and dealt with categories of conduct. The plan administrator was thus required (1) to interpret the criteria contained in these materials, (2) to assess the conduct that led to the termination, and then (3) to determine whether the conduct

met the corporate standards for "cause" for termination.

The administrator's obligation under the ITTSESPP to determine whether an employee has engaged in sexual harassment involves exactly the sort of managerial discretion characteristic of an ERISA plan. Sexual harassment may take many different forms. Necessarily, the administrator must assess various factual allegations about the employee's behavior, and evaluate whether the conduct described amounted to sexual harassment under the pertinent guidelines. Moreover, although the decision to terminate the employee and the decision whether the termination was for cause were lodged in the same set of corporate managers (Tr. at 1390-91, 1409-10, 1419, 1424-25), this does not alter the fact that the basic determination whether to terminate for purported cause constitutes a discretionary analysis that triggers ERISA coverage. See, e.g., Schonholz, 87 F.3d at 74 (corporate managers decided on termination and also determined whether termination was for misconduct or poor performance).

We note in addition that the ITT corporate guidelines addressed conduct other than sexual harassment that was considered inimical to corporate policy. (Jt. Ex. 57). These forms of misconduct included improper trading in securities, noncompliance with antitrust laws, discrimination in employment and the bribing of government officials. (Id.). In each instance, the company

similarly would be required to assess the charges and the credibility of the witnesses to determine whether "for cause" termination was warranted.

Finally, as noted, if the terminated employee was receiving periodic severance payments, the company could terminate those payments if the recipient engaged in specified forms of misconduct. This proviso also necessarily entrusted the administrator with ongoing monitoring responsibilities and required discretionary judgments as to the subsequent conduct of the former employee.

Inevitably, then, the determination of whether an employee has been fired "for cause" or was otherwise ineligible for benefits under the ITTSESPP involves the application of a series of subjective criteria that could not possibly be accomplished in the mechanical, routine manner described by the courts in Fort Halifax or James. The various discretionary, or subjective decisions entrusted by ITTSESPP to the plan administrator compel us to view the scheme as a "plan" under ERISA.

C. Effect of ERISA Coverage

Because the defendant's severance plan is covered by ERISA, the jury verdict for plaintiff cannot stand. The claim as formulated by plaintiff was for common-law breach of contract, but ERISA necessarily preempts that claim, leaving plaintiff with a claim under 29 U.S.C. § 1132(a)(1)(B) for denial of benefits.

Leaving aside whether the jury was properly instructed to assess an ERISA claim, we note that the Second Circuit has recently held that "there is no right to a jury trial in a suit brought to recover ERISA benefits." Sullivan, 82 F.3d at 1258-59. In substance, the Circuit Court chose to follow the lead of other circuits in holding that a claim for benefits due under an ERISA plan is equitable in nature, thus precluding a jury trial. Id.[9] We therefore review the evidence presented at the twelve-day jury trial and issue new findings. See id. at 1261.

D. Review of Denial of Benefits

1. Standard of Review

Before assessing the evidence, we address the legal standard by which to review the decision of ITT/Sheraton to deny plaintiff severance benefits. In lawsuits challenging a denial of benefits, the court normally reviews the denial de novo. Firestone Tire & Rubber Co. v. Bruch, 489 U.S.

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[9] The Court looked to precedent as well as to the applicability of the "arbitrary or capricious" standard of review for many ERISA plans, noting that "the significance of the [arbitrary and capricious] standard, while second nature to a judge, is not readily communicated to jurors." Id. at 1258 (quoting Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (5th Cir. 1985)). We note that in the current case, for reasons explained below, this deferential standard is applicable to an assessment of the administrator's denial of severance benefits to plaintiff. We therefore need not consider whether Sullivan might be limited to such a plan.

101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). See also Algie v. RCA Global Communication, Inc., 891 F. Supp. 875, 885 (S.D.N.Y. 1994), aff'd, 60 F.3d 956 (2d Cir. 1995). If, however, the "benefit plan gives the administrator or fiduciary authority to determine eligibility for benefits or to construe the terms of the plan," the "administrator's interpretation is reviewed for an abuse of discretion," a determination that turns on whether the decision was "arbitrary or capricious." Bruch, 489 U.S. at 115; Katz v. Colonial Life Ins. Co., 951 F. Supp. 36, 39 (S.D.N.Y. 1997); Crocco v. Xerox Corp., 1997 U.S. Dist. LEXIS 1822, F. Supp. , 1997 WL 73210, at(D. Conn. Feb. 5, 1997). In choosing the legal standard of review, we are governed by the language of the plan, and note that "[a] plan can give an administrator discretion with respect to some decisions but not others . . . . A plan administrator has exactly the amount and type of discretion granted by the plan, no more and no less." Wulf v. Quantum Chemical Corp., 26 F.3d 1368, 1373 (6th Cir.), cert. denied, 130 L. Ed. 2d 601, 115 S. Ct. 667 (1994). See, e.g., Algie, 891 F. Supp. at 885; Zisel v. Prudential Ins. Co., 845 F. Supp. 949, 950 (E.D.N.Y. 1994).

In this case the plan provided:

> This Plan shall be administered by ITT, who shall have the exclusive right to interpret this Plan, adopt any rules and regulations for carrying out this Plan as may be appropriate and decide any and all

> matters arising under this Plan, including but not limited to the right to determine appeals. Subject to applicable Federal and state law, all interpretations and decisions by ITT shall be final, conclusive and binding on all parties affected thereby[.]

(Jt. Ex. 7 at P 12). By its own terms, the quoted provision gives the plan administrator discretion both to interpret the plan and to dispose of benefit requests. See, e.g., Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1141 (3d Cir. 1993), cert. denied, 511 U.S. 1004, 114 S. Ct. 1369, 128 L. Ed. 2d 46 (1994); Miller v. United Welfare Fund, 851 F. Supp. 71, 74 (E.D.N.Y. 1994), vacated on other grounds, 72 F.3d 1066 (2d Cir. 1995). Moreover, in denying plaintiff any severance benefits, the administrator necessarily exercised that discretion both in interpreting the plan and in assessing the facts pertinent to its application.[10]

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[10] This analysis of "discretion" is distinct from that undertaken when determining whether the program is an ERISA plan. As indicated in the preceding section, when assessing the applicability of ERISA, the court looks to the plan description to determine whether it vests some meaningful discretion in the administrator, irrespective of whether, in the case before it, the exercise of that discretion is in issue. See, e.g., Bogue, 976 F.2d at 1323. In contrast, when we determine the standard of review to apply to a challenged decision by the administrator, we

(continued...)

As noted, the ITTSESPP provided that severance benefits may be denied to employees terminated "for cause." The plan did not itself define "for cause," and the substantive content of that term therefore requires reference to other corporate documents categorizing the types of conduct that the term was intended to cover. Moreover, the administrator is called upon to determine the nature of the employee's alleged misconduct and, in this case, to evaluate whether that conduct amounts to sexual harassment. See, e.g., Bogue, 976 F.2d at 1325. In short, the plan contains a sufficient grant of discretionary authority to trigger deferential review. "When a plan includes even one important discretionary element, and the power to apply that element is unambiguously retained by its administrator, we may not second-guess the exercise of that discretion." Id.[11]

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[10](...continued)
look to whether the plan gives the administrator discretion with respect to that particular decision. See, e.g., Algie, 891 F. Supp. at 886 (citing Kinek v. Gulf & Western, Inc., 720 F. Supp. 275, 281-82 (S.D.N.Y. 1989), aff'd sub nom. Kinek v. Paramount Communications, Inc., 22 F.3d 503 (2d Cir. 1994). See also p. 26, n.11 infra.

[11] The fact that the plan may require the exercise of some discretion as to certain issues will not trigger deferential review if those issues were not implicated in the
(continued...)

In reaching this conclusion, we acknowledge that, even if the plan accords the administrator some discretion, the court may be required to conduct a more searching review if it finds that the administrator was acting under a conflict of interest in making his decision. See, e.g., Sullivan, 82 F.3d at 1255 (citing Bruch, 489 U.S. at 115). A reasonable interpretation of the plan will stand, however, unless the plaintiff can show not only that a potential conflict of interest exists, but also that the conflict in fact "affected the reasonableness of the . . . decision." Id. at 1255-56, 1259 (quoting Pagan v. NYNEX Pension Plan, 52 F.3d 438, 443 (2d Cir. 1995)). If the court finds that the plan administrator was in fact influenced by the conflict of interest, it must interpret the plan de novo. Id. at 1256.

In this case we find a potential conflict of interest since the severance plan was unfunded and hence payment came directly from ITT/Sheraton. (Tr. at 1422). It was therefore in the financial interest of the company to label

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[11](...continued)
administrator's decision. See, e.g. Heidgerd v. Olin Corp., 906 F.2d 903, 908-09 (2d Cir. 1990); Algie, 891 F. Supp. at 886; Kinek, 720 F. Supp. at 281-82. In this case, however, the plan gave broad discretion to the administrative both as to the interpretation of the plan and as to the adjustment of benefit applications, and the issue confronting the administrator -- the applicability of the "for cause" exception -- plainly required the exercise of such discretion.

plaintiff's termination as being "for cause." Despite that inherent conflict, however, we do not conclude that this conflict tainted the administrator's decision that plaintiff's termination was for cause. Plaintiff must prove that such a conflict influenced the decision, and we cannot say that he has met his burden here. See, e.g., Whitney, 106 F.3d at 477-78; Sullivan, 82 F.3d at 1259 (holding that burden of proving that the conflict of interest affected the administrator's decision rests with the plaintiffs).

The evidence reflects that ITT/Sheraton received complaints about plaintiff from two high-ranking employees at the St. Regis, that these complainants documented their accounts with more-or-less contemporaneous notes and that they both appeared to be very credible. Given the sensitive nature of the allegations, the substantiation of a number of the charges by others working at the hotel, the equivocal responses of the plaintiff when questioned about the allegations, and his prominent role as the senior corporate representative at the flagship hotel of the Sheraton chain, there was ample reason for the company to contemplate termination for misconduct. Moreover, although the amount of severance benefits at issue -- in excess of $ 360,000.00 -- was substantial, we are offered no evidence that the company's decision to label his termination as being for cause was pretextual and undertaken for the purpose of avoiding payment of those benefits. Given the size of the company, the fact that more than $ 200 million had

recently been invested in refurbishing the St. Regis (Tr. at 306-07), and the fact that litigation expenses triggered by the denial of benefits could be expected to approach, if not surpass, the amount purportedly saved, we see no basis for inferring that defendant was animated by the desire to avoid paying the benefits.

We therefore review the decision of ITT/Sheraton to deny plaintiff severance benefits under the "arbitrary or capricious" standard.[12] Under this standard, the plaintiff must show that ITT's decision to terminate him "for cause" was "without reason, unsupported by substantial evidence or erroneous as a matter of law." Li v. Travelers Ins. Co., 1996 WL 732553, at(D. Conn. Dec. 18, 1996) (quoting Miller v. United Welfare Fund, 72 F.3d 1066, 1070 (2d Cir. 1995)). Substantial evidence in such cases is "evidence that a reasonable mind might accept as adequate to support

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[12] We note that the deferential standard we apply to the facts of this case does not differ substantially from the standard applied at trial by the jury. At trial, the jury was asked whether the decision of ITT/Sheraton to terminate plaintiff for cause was arbitrary or in bad faith -- a standard of review originating in state law. See, e.g., Gehrardt, 581 F.2d at 12; Gitelson, 17 N.Y.2d at 42, 268 N.Y.S.2d at 12. This standard is very similar to the "arbitrary or capricious" criterion, and courts have used the terms interchangeably. See, e.g., Miller, 851 F. Supp. at 74; Seff v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund, 781 F. Supp. 1037, 1040 (S.D.N.Y. 1992).

the conclusion reached by [the decisionmaker]." Eymer v. Ground Round, Inc., 913 F. Supp. 693, 696 & n.4 (N.D.N.Y. 1996)(citing Pagan, 52 F.3d at 442).

When applying the "arbitrary or capricious" standard, the court must limit its inquiry to that information available to the plan administrator as well as any evidence going to the administrator's bad faith. Zisel, 845 F. Supp. at 950. We turn now to a review of what the trial record discloses.

2. Was the Denial of Benefits Arbitrary or Capricious? - The Facts

In assessing the reasonableness of the decision to deny benefits, we start by summarizing the most pertinent events that led to the termination.

(a). Plaintiff's Hiring and Training in Sexual Harassment

Peter Tischmann was hired by ITT/Sheraton in 1972. (Tr. at 77). He progressed through the organization and in 1982 became the general manager of the Heliopolis Sheraton in Cairo, Egypt. (Tr. at 79, 508-09). In 1985, he became the managing director of the St. Regis Hotel in New York, the flagship hotel in the ITT/Sheraton chain. (Tr. at 83, 522, 901).

As a Sheraton employee and executive, plaintiff received a thorough education in recognizing and confronting sexual harassment. This education took many forms.

ITT/Sheraton maintained and distributed an official "Corporate Code of Conduct." This document stated that "sexual harassment has no place in a professional business environment and will not be tolerated. . . ." (Tr. at 595, 599; Jt. Ex. 57 at 14). The corporation memorialized this policy in the general manager's handbook and in a separate handbook for each individual hotel. (Tr. at 595; Jt. Ex. 53 at 6).

As managing director of the St. Regis, plaintiff was involved in drafting the handbook for the hotel. (Tr. at 1652). In a passage that plaintiff claimed to have authored, the handbook stated:

> All associates, supervisors and members of management, both male and female, are strictly prohibited from sexually harassing or making improper advances towards other associates, supervisors or members of management. Sexual harassment includes unwelcome or unsolicited verbal, physical or sexual conduct that is made a term or condition of employment, is used as the basis for employment or advancement decisions; or has the purpose or effect of unreasonably interfering with the work or creating an intimidating, hostile or offensive work environment. The Hotel opposes any form of sexual harassment and anyone who violates this policy will be subject to appropriate disciplinary action. If you are confronted with any

> form of discrimination or proscribed activity, including sexual harassment, it is imperative that you immediately report the incident. . . .

(Tr. at 159-61, 602, 1652; Jt. Ex. 58 at 24-25).

Further, ITT/Sheraton required plaintiff's attendance at a weekend training seminar in 1989 for general managers concerning sexual harassment. (Tr. at 604-05).[13] Corporate representatives at this seminar discussed in detail the ITT/Sheraton policy on sexual harassment, which encompassed both quid pro quo harassment and hostile work environment. The lecturers explained the accepted definitions of such misconduct and provided numerous concrete examples of what kinds of behavior were prohibited by the policy. (Tr. at 594, 606, 610-17, 1116-19; Def.'s Exs. DL, P). The examples included "friendly" pats or squeezes, brushing against the body, lewd or off-color jokes, leers, words or conversation of a sexual nature or involving sexual innuendo, and asking people about their private life in a sexual manner. (Tr. at 594-95, 616-17, 1378-79; Def.'s Ex. P). The materials also specified that the focus of the policy was on the victim,

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[13] Plaintiff claimed that he could not recall attending this seminar. (Tr. at 293-94). Both Mary Ann Palmer and Carl Madda, who conducted the seminar, recalled seeing plaintiff sitting in the front row (Tr. at 605-06, 612-13, 1116), and I find their testimony on this point to be entirely credible.

whose feelings about the conduct were central to deciding what was improper. (Tr. at 616).

In February 1992, the company distributed to all ITT/Sheraton general managers a document entitled "Outline of Sexual Harassment Definitions, Prevention and Complaints." (Jt. Ex. 1). This document contained guidelines for evaluating evidence of harassment[14], and indicated the general manager had an "affirmative duty to investigate" complaints of harassment and must "take immediate and appropriate corrective action." (Tr. at 1379-81; Jt. Ex. 1).

(b). The Allegations of Sexual Harassment Against Plaintiff

The trial record reflects that while employed by ITT/Sheraton, plaintiff was the target of several complaints

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[14] The guidelines stated:

(a) The resolution of claims depends on the credibility of the parties; (b) Harasser and victim questioned in detail; (c) Search thoroughly for corroborative evidence of any nature; (d) Question supervisors, managers and co-workers about their knowledge of the alleged harassment, including persons who observed demeanor of victim; (e) Victim's account must be sufficiently detailed and internally consistent so as to be plausible; (f) Detailed review of knowledge of managers and supervisors.

(Jt. Ex. 1 at 5).

of sexual harassment. Of these, one dated from 1989 and was not the stated basis for the defendant's decision to terminate plaintiff. The other two complaints were made in 1992 by the director and assistant director of human resources at the St. Regis.

(i). Antonia Dahan

In December 1988 ITT/Sheraton commenced a major renovation of the St. Regis Hotel, requiring the closure of the hotel for several years. (Tr. at 111). Accordingly, plaintiff was reassigned for much of that period to serve as acting general manager of Sheraton's Carlton Hotel in Washington, D.C. (Tr. at 125).

Antonia Dahan worked as a hostess at the Carlton Hotel during plaintiff's tenure there. (Def.'s Ex. T). In September 1989, she filed charges with the District of Columbia Office of Human Rights, alleging that she had been sexually harassed by the plaintiff while he was serving as the hotel's acting general manager. (Tr. at 1109; Def.'s Ex. T). The gravamen of her complaint was that on three occasions plaintiff had grabbed her by the arm or waist and had pulled or pushed her towards the task he wanted accomplished. (Tr. at 1112-13; Def.'s Ex. T). She also claimed that he had watched her "in a suggestive, sexy manner" and "tried to strip [her] with his imagination." (Tr. at 1113; Def.'s Ex. T). She asserted that this behavior was intimidating, humiliating, and quite stressful. (Tr. at 1113-14; Def.'s Ex. T).

On this occasion Sheraton chose to defend plaintiff against these charges. Carl Madda, Sheraton's director of labor relations, represented plaintiff in this proceeding. Although plaintiff admitted grabbing Ms. Dahan several times by the arm, he denied that there had been any sexual content to the encounters (Tr. at 144-45), and eventually all charges were dismissed as unproven. (Tr. at 142-44, 265, 1114; Pl.'s Exs. 17, 22). Nonetheless, at the conclusion of the case Madda warned plaintiff about the difference between European and American customs and cautioned him against touching employees, irrespective of the reason for it. (Tr. at 144-45, 1114, 1369).

(ii). Sarah Cannon

Sarah Cannon began her career with Sheraton in 1986 and started working at the St. Regis in March 1990 as the assistant director of human resources. (Tr. at 365). At the time the hotel was still undergoing renovation, a process that would not be completed until September 1991. Ms. Cannon therefore began her work with the so-called pre-opening team, located at the Sheraton Centre. (Tr. at 127, 367). At trial Ms. Cannon recalled no specific untoward incidents involving plaintiff until 1991, other than his question to her, at her initial interview, about where she had gotten her "dark good looks." (Tr. 366-67). She did note, however, even then his propensity to stand too close, stare at her very "intensely," and on occasion reach out and adjust her earrings, which he claimed were not fitted

correctly. (Tr. at 366-69). In contrast, she did not recall him staring at or adjusting the clothing of male employees. (Tr. at 369).

Ms. Cannon testified that her serious difficulties with plaintiff began on February 14, 1991 -- Valentine's Day -- when plaintiff chose to distribute roses to all of the women in the office. On this occasion, he entered her office, closed the door behind him and came over to her desk. He then bent closely over her and said "Sarah, let's be each other's secret valentine. Valentines give each other kisses, so how about a kiss?" (Tr. at 371). Ms. Cannon replied that she would not kiss him, got up and opened the door. (Id.). She promptly reported this incident to her supervisor, Anne Power, the director of human relations. (Id.).

Shortly after this incident, the business office of the St. Regis was moved back into the hotel from its previous location at the Sheraton Centre. Following that move, Ms. Cannon testified, she had several difficult encounters with the plaintiff. The first occurred in August 1991, when she went to plaintiff's office to discuss a business matter. At that time, she overheard a joking conversation between plaintiff and his administrative assistant, Maria Peralta, in which plaintiff promised to spank Peralta if she did not get back to work. (Tr. at 373). Ms. Cannon completed her interview with plaintiff, and began to leave his office, but in doing so she mistakenly opened the closet door rather

than the exit door. She testified that plaintiff followed her into the closet and shut the door. (Tr. at 374). When she demanded that he open the door, he did not respond, and she then threatened to scream. Plaintiff then asked, "so Sarah, when else do you scream?" (Id.). At her insistence, plaintiff finally opened the closet door and she exited. He then followed Ms. Cannon down the hall and repeated the question, before finally allowing her to leave. Again, she immediately reported this incident to Anne Power. (Tr. at 375). Both women documented this incident in the contemporaneous, handwritten notes that they began to keep at approximately this point in time. (Tr. at 485, 760; Def.'s Ex. AR).[15]

In late August 1991, shortly before the official reopening of the St. Regis, Ms. Cannon attended a pre-opening dinner for several staff members at the hotel's restaurant, Lespinasse. Also attending the dinner were Anne Power, Maria Peralta and Arthur Backal, the director of catering. (Tr. at 15). Near the end of the meal plaintiff joined the group, and asked Ms. Cannon whether she had enjoyed her meal. When she responded that she had, plaintiff remarked "good, because that's the last meal you will ever have in here." (Tr. at 385). Later that evening, while still in the restaurant, plaintiff asked Ms. Cannon her

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[15] Ms. Cannon destroyed her handwritten notes subsequent to preparing a formal, typed complaint.

opinion of a mirror decorating the wall of the restaurant. She replied that it was beautiful, upon which plaintiff asked whether she had the same type of mirror over the bed in her apartment. (Tr. at 385).

At the conclusion of the meal, plaintiff asked the entire group to join him in a tour of the hotel's new health club facilities. In the presence of other members of the group, plaintiff invited Ms. Cannon to join him in the sauna and "give each other massages." (Tr. at 386). She emphatically responded that she would not. (Id.). These events were witnessed by, and even commented on, by other members of the group. (Tr. at 387, 703, 1551-54). Ms. Power immediately recorded the incident in a note for her file. (Tr. at 766; Def.'s Ex. BB).

Ms. Cannon was understandably distressed by these incidents, but confined herself to reporting them to her supervisor, Ms. Power, who, as will be seen, was encountering similar problems with Mr. Tischmann. Finally, however, in November 1991, during a business dinner with Power and Carl Madda, the director of labor relations for Sheraton, she revealed the problems, but only in response to a question from Madda about how she was enjoying her work. At the same time she requested that Madda not disclose this confidence to anyone or act on it, apparently principally because of her fear of retaliation from Tischmann and her concern that he would publicly embarrass her -- a concern that sprang at least in part from

disparaging comments that he had made in the past about Ms. Dahan. (Tr. at 707).

After this dinner with Mr. Madda, Ms. Cannon testified, she encountered similar difficulties with plaintiff on three more occasions. In December 1991, she was working in a hotel pantry, washing dishes as a volunteer to assist the so-called maitre d'etage, when Tischmann entered the pantry, placed his hand on her neck, and then on her back. Plaintiff then proceeded to touch her buttocks briefly, before the maitre d'etage, whose back was to them, turned around. (Tr. 390-92).

Ms. Cannon reported that in January 1992, while attending a meeting of hotel employees on the roof of the St. Regis, she was approached by plaintiff, who surreptitiously placed his hand on her back and then stroked her back and buttocks, while giving her directions about how to carry out her job. (Tr. at 391-92). Not surprisingly, she felt humiliated by this behavior. (Tr. 393).

Finally, she testified to an incident in February 1992, when she was preparing certain forms. Plaintiff entered her office and, on handing him the forms, Ms. Cannon remarked that they "worked fast together." (Tr. at 394). According to Ms. Cannon, plaintiff responded "But Sarah, I don't do everything fast." (Id.).

(iii). Anne Power

Anne Power joined the St. Regis as the director of

human resources in February 1991. (Tr. at 496, 695, 699). She testified that soon after her arrival, she noticed plaintiff's penchant for standing too close, placing his arm around her, and putting his face very close to hers while talking. (Tr. at 702). She also reported a series of other incidents involving inappropriate behavior.

On one occasion in early 1991 plaintiff put his arm around Ms. Power's shoulder and then brushed it against her breast. On another occasion, while seated with her he placed is hand on her knee. (Tr. 712-13).

In July 1991, while eating lunch in the staff dining room, Ms. Power observed plaintiff joking with Peralta and Mary Lou Garcia, the financial controller for the St. Regis, about men having mistresses and spanking women who misbehaved. (Id.). Ms. Power testified that plaintiff stared at her pointedly while she blushed and that he appeared to enjoy her discomfort. (Id.). At this point, Ms. Power began to maintain a file of handwritten notes, documenting her own and Ms. Cannon's experiences with Mr. Tischmann. (Tr. at 705; Def.'s Ex. AR).

According to Ms. Power, in August 1991 plaintiff insisted on inspecting the womens' locker room at the hotel with her. He then announced that he had been responsible for obtaining these commodious quarters for the staff and indicated that she should kiss him on the cheek, apparently as a sign of gratitude. (Tr. at 708). Ms. Power was most reluctant to do so, but complied, although she felt

humiliated by the episode. (Id.; Def.'s Ex. AQ).

Ms. Power reported and recorded one other incident involving plaintiff. In February 1992, she attended a meeting with plaintiff, Backal and the restaurant chef in the Lespinasse kitchen, to discuss staffing problems. During their conversation, there was an allusion to the pastry chef, who was female, and plaintiff remarked, apparently as a joke, that the pastry chef should not come to work when she had her period, as this would cause any sauce she made to curdle. (Tr. at 711; Def.'s Ex. AS).

Power never spoke with plaintiff about the inappropriate nature of his conduct. (Tr. at 764). She attributed her silence to her fear of plaintiff and her desire not to "rock the boat" at a delicate time for the hotel, which was in the process of reopening. (Tr. at 704, 713).

(c). Sheraton's Initial Investigation

As noted, in November 1991, Cannon and Power first brought their complaints about plaintiff's behavior to Carl Madda. (Tr. at 388-89, 710, 1106, 1119-1120). They asked, however, that he not take any action, apparently because of fear as to the consequences for them of such a disclosure. (Tr. at 388-89, 710, 1121). In deference to the women's request, Madda did not begin an immediate investigation of the complaints, as was otherwise required by ITT and Sheraton sexual harassment policies (Def.'s Ex. M; Jt. Ex. 17), and instead kept the matter confidential. (Tr. at 388-89, 710, 1190).

In February 1992, however, Madda informed Mary Ann Palmer, vice-president and director of human resources for Sheraton's North American Division, that Ms. Cannon was uncomfortable dealing with plaintiff and suggested a transfer to another hotel. (Tr. at 590, 1122). In making this suggestion, Madda did not believe that he was violating Ms. Cannon's request for confidentiality, as he was merely requesting that she be transferred to another hotel and not seeking any disciplinary action against Tischmann. (Tr. at 1149, 1122-23, 1149).

At the time of this discussion, Ms. Palmer was at the St. Regis, attending a meeting of the directors of human resources for the various Sheraton properties. (Tr. at 618). Palmer immediately queried Anne Power about the nature of Ms. Cannon's complaints and learned that Ms. Power, too, felt harassed by plaintiff. (Tr. at 620, 714-15, 795). Palmer then met with both Ms. Cannon and Ms. Power. (Tr. at 395, 714-15). She listened to the substance of their allegations and urged them both to file formal complaints. (Tr. at 620). In discussing the matter, she reminded both women that, as human resource specialists, they had a special obligation to come forward and report such conduct. (Tr. at 621).

Palmer finally obtained the agreement of both women to file complaints. (Tr. at 396-97). She then immediately called Jim Smith, the corporate director of human resources, to apprise him of the situation (Tr. at

396-97, 623), and he agreed to commence an investigation. (Tr. at 625, 807). Palmer then asked both women to embody their contemporaneous, written notes in formal memoranda and to fax them to her office in Boston. (Tr. at 397, 626, 717). Both women complied and faxed these documents within the next two days. (Tr. at 397, 626, 717; Jt. Exs. 15-16). Palmer then turned the investigation over to Smith. (Tr. at 628).

On reading the written complaints, Smith consulted with John Kapioltas, the president of ITT/Sheraton. (Tr. at 809). Kapioltas had originally hired Tischmann as general manager of the St. Regis, and he considered himself to be a personal friend of Tischmann. (Tr. at 508-09, 512). Nonetheless, he concurred in the need for a prompt inquiry, and assigned Madda to investigate the matter. (Tr at 511-13, 809).

Kapioltas then called plaintiff to inform him in general terms that the company would be investigating charges of sexual harassment that had been filed against him. (Tr. at 513, 809). Kapioltas indicated that during this conversation, plaintiff did not ask for any details of the charges. (Tr. at 513).

(d). Carl Madda's Investigation and Report

On March 5, 1992, Madda began an on-site investigation at the St. Regis. (Tr. at 809). He first advised plaintiff that he had been assigned to investigate sexual harassment complaints levied against him by certain female

workers at the hotel, but did not disclose the identities of the complainants or the details of their allegations. (Tr. at 1151, 1281-82).

Madda then proceeded to interview Ms. Power and Ms. Cannon, who repeated their respective accounts of their dealings with Tischmann. (Tr. at 179, 197, 400, 720, 1151, 1363; Def.'s Ex. DQ-1). At Madda's request, Ms. Power also suggested the names of other individuals at the hotel whom he might interview for further information. (Tr. at 721). Based on Ms. Power's recommendation, Madda also interviewed Eleanor Ribaudo, secretary to the front office manager; Jude Woodstock, secretary to the director of sales and marketing; Marcello Vasquez, the director of travel industry sales; Arthur Backal; and Kathi Ransom, director of training. Finally, Madda interviewed three employees suggested by plaintiff -- Maria Peralta, Ann Barzola, the catering manager, and Ann Arthur, a hostess. (Tr. at 653, 721, 1151, 1334; Def.'s Exs. DQ, DS). Backal confirmed certain of Power's and Cannon's accounts and labelled plaintiff's conduct sexual and inappropriate. (Tr. at 1152, 1158, 1551-54). Ribaudo, Ransom, Vasquez and Woodstock all acknowledged that plaintiff touched female employees, but only Ribaudo and Vasquez characterized plaintiff's conduct as inappropriate or threatening. Woodstock refused to comment on the situation. (Tr. at 660, 1153; Def.'s Exs. DQ, DS). Peralta praised plaintiff and called his touching merely a "style."

(Def.'s Ex. DQ).

On March 6, 1992, Madda compiled the results of his investigation and drafted a written report for Smith. (Tr. at 811). In preparing this report Madda relied on his handwritten summaries, prepared after each interview, recounting the principal comments made by the interviewee. (Tr. at 1161; Def.'s Ex. DQ).

The report summarized Madda's meetings with plaintiff, Ms. Cannon and Ms. Power, and it contained summaries of comments obtained from the interviews of the St. Regis staff members. (Tr. at 1170-80; Def.'s Ex. DS). The typed version of the report contained several conceded inaccuracies, most resulting from transcription errors by the typist. Thus, it omitted the summaries of the statements of Peralta and Backal and attributed Barzola's statement -- that she did not feel threatened by plaintiff -- to Backal. (Tr. at 1302-03). Finally, the statement attributed to Ransom indicated that she had said that she was "frightened" when plaintiff grabbed her arm on one occasion. (Def.'s Exs. DQ, DR). At trial, however, Ransom denied using the word "frightened" and indicated that she had merely been surprised. (Tr. at 1645).

In his report, Madda advised Smith that a factual basis existed for the charges lodged by Ms. Cannon and Ms. Power. He further concluded that plaintiff had created a hostile working environment for several women. (Tr. at 1169-71; Def.'s Ex. DS).

(e). Senior Management's Investigation

Smith reviewed Madda's report with Kapioltas. Kapioltas decided that Sheraton's personnel committee, composed of several members of Sheraton's board of directors[16], should consider the charges and determine what action was appropriate. (Tr. at 812). On March 12, 1992, the personnel committee reviewed Madda's report and the statements of Power and Cannon and determined that the charges appeared to be credible. The committee also decided at the time that if the charges were borne out, termination would be appropriate because plaintiff's actions were apparently part of a pattern (Tr. at 1463), the incidents were so severe and plaintiff's position was one of such high responsibility. (Tr. at 515-16, 816, 1391, 1410). Nonetheless, it was also agreed that the next step would be to give plaintiff the opportunity to deny the charges or offer some mitigating circumstances. (Tr. at 517-18, 817-18, 1410).

In an effort to confirm the facts, the committee therefore authorized a follow-up inquiry. Smith, Pausig, and Bill Patton, ITT's labor attorney, were instructed to meet with plaintiff and with his accusers. They first met with Ms. Power and Ms. Cannon separately as a final

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[16] The personnel committee consisted of John Kapioltas, Rand Araskog, Ralph Pausig, Jim Smith and Howard Aibel, ITT's general counsel. (Tr. at 1390).

verification of their credibility and the truth of their allegations. (Tr. at 401, 517, 816, 1391-1409).

On determining that both women were credible, Smith and Patton promptly met with plaintiff to offer him the opportunity to deny or explain his conduct and possibly offer some mitigation of the charges. (Tr. at 818). Smith testified that during the meeting he did not give plaintiff a copy of the complaints written by Ms. Power and Ms. Cannon, but he read each allegation aloud to plaintiff and also summarized for him the contents of Madda's report. (Tr. at 819; Def.'s Ex. DD). According to Smith, over the course of an extended discussion, plaintiff did not deny the charges, but in fact commented that "that is the way I am, I touch people." (Tr. at 204, 517-18, 819). Given plaintiff's virtual admission, Smith proceeded with the termination and initiated talks about a possible settlement. (Tr. at 819-21).[17]

3. Assessment of Plaintiff's Evidence

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[17] Plaintiff testified that Smith did not directly tell him about the termination at their meeting. According to plaintiff, he left the meeting to take his family to the airport by limousine, and it was his secretary who subsequently advised him by telephone that Smith had announced to hotel officials that plaintiff had been fired. (Tr. at 205-07). Even if we accepted plaintiff's version of the meeting, it would not affect the outcome of our analysis.

of Arbitrariness or Bad Faith

As noted, it is plaintiff's burden to demonstrate that the decision of the plan administrator to deny him severance benefits was arbitrary or capricious. I conclude that he has not met his burden.

The trial evidence reflects that the company was confronted with detailed allegations by two high-ranking and apparently quite credible officials of the premier hotel in the Sheraton chain to the effect that plaintiff had engaged in repeated misconduct that plainly fit within the company's highly publicized definition of sexual harassment. Moreover, those charges were supported by contemporaneous documentation and, in several cases, by corroborative accounts of other hotel employees both as to the specific incidents and as to the general pattern of plaintiff's dealings with the hotel staff.

Further support for the charges was found in the equivocal response of the plaintiff when confronted by the charges. According to the very credible testimony of Jim Smith, plaintiff virtually admitted the truth of the allegations, simply brushing them off as a matter of personal style -- a variant of his trial attorney's intriguing repeated use of the term "hands on management style." (Tr. at 204, 270-72, 274-78, 819, 941-42, 944-45).[18]

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[18] To the extent that plaintiff denied the substance of
(continued...)

As for the decision by ITT/Sheraton to terminate plaintiff in the wake of the finding that he had committed numerous prohibited acts of harassment, on its face the decision was entirely reasonable. Tischmann was the highest ranking representative of ITT/Sheraton at its flagship hotel, a position that necessitated placing a vast amount of trust in him to act with judgment and discretion since there was no on-site supervision of him. Moreover, by virtue of his position, he was intimately familiar with

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[18](...continued)
Smith's encounter with him, I find his testimony simply not credible and of a piece with several instances of evasive or unbelievable testimony by him. For example, plaintiff testified that he did not know the meaning of the word "spank" prior to June 1992 (Tr. at 237-39) and that he never "used abuse or gross language in [his] life." (Tr. at 157). He denied the Lespinasse dining room and health club incidents despite extensive corroboration by other witnesses. (Tr. at 223-27). He further denied flirting with Maria Peralta, an occurrence also corroborated by other witnesses. (Tr. at 241, 337-38). He failed to recall the incident in which he had engaged in sexually suggestive conversation with Ms. Peralta and Ms. Garcia and fed Ms. Peralta a grape (Tr. at 342), although he admitted feeding Ms. Peralta grapes on at least one occasion. (Tr. at 242). Plaintiff argued in the alternative that he could not have joked with Ms. Garcia and Ms. Peralta because he had been at Dartmouth College that day, spending parent's weekend with his daughter. (Tr. at 238).

the very strict corporate policy against harassment -- a policy that was embodied, among other places, in the St. Regis handbook for the staff, of which he claimed authorship. Moreover, Tischmann had been explicitly warned by senior company officials about improper behavior of this sort, not only at the company-wide seminar that he had attended in 1989, but also in the wake of his prior involvement in the proceeding growing out of charges lodged against him by Ms. Dahan for misconduct in dealing with a subordinate.[19]

Furthermore, as a simple matter of business interest, it is difficult to imagine that the company could do anything less drastic once it concluded that the charges were well-founded. The complainants were the principal representatives of the company's human resources department, the unit charged with the responsibility for protecting the rights of employees, including the right to be free from such misconduct. Had the company failed to act quickly and decisively, it would have faced the very serious

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[19] We note that Sheraton defended Tischmann on that occasion, but he admitted in that proceeding having engaged in physical contact with the complainant that at least raised a question of propriety, even if it was not charged with sexual overtones. This led Mr. Madda to warn Tischmann, in the wake of the dismissal of the charges, that he was to refrain from touching staff members.

prospect of horrendous publicity and at the very least a serious adverse impact on senior staff morale. Moreover, given the fact that Sheraton's hotels compete for business in a service sector, any public hint of unremediated scandal could be devastating for its public image and long-term viability.

Faced with the very compelling showing that defendant did indeed terminate him for cause and that the administrator's decision to deny him severance benefits was not only reasonable, but compelled, plaintiff presses several theories to demonstrate the arbitrary or capricious nature of that decision. First, he denies that he committed some of the charged acts or that he did so with malicious intent, or that they constituted harassment under the plan, and he suggests that the company had no reason to conclude otherwise. Second, plaintiff offered evidence at trial to suggest that his termination was for reasons other than his alleged harassment of Cannon and Power. Third, he pressed the notion that the decision to fire him had been arbitrarily reached, principally because the process had been either fundamentally unfair or infected by obvious errors. We find none of these assertions persuasive.

(a). Plaintiff's Assertion of Factual Innocence

Plaintiff's assertion that he did not commit sexual harassment within the meaning of the plan is both belied by the evidence and irrelevant in view of the deference that is owed the corporate decision to the contrary. On the factual

issue, the evidence is, as we have noted, both overwhelming and highly credible that plaintiff engaged in a series of acts that involved patently offensive and uninvited touching and crude, sexually-charged remarks directed to both Ms. Cannon and Ms. Power. Moreover, it appears from the testimony of others that this was an extreme example of a general pattern of conduct by him in which he used the power of his supervisory position to impose himself in a physical or psychological way on others, particularly female staff members. There is also no meaningful question that this conduct contravened the corporate policy against sexual harassment.[20]

On the legal question, whether plaintiff did or did not commit the charged acts and whether those acts actually violated corporate policy are not the dispositive issues. Given the limited review that we are empowered to conduct of the administrator's decision, we may ask only whether the company had a reasonable basis for concluding that plaintiff had violated its policy, and for reasons that we have noted, it plainly had a substantial basis for that conclusion.

(b). The Pretext Argument

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[20] The fact that, according to plaintiff, this is his "style of management" (Tr. at 162-63, 174, 204, 270-71, 274-78) is inconsequential. The company is entitled to demand that its well-paid employees conform their management style to company (and legal) requirements.

In the course of the trial plaintiff suggested that, whatever the merits or demerits of his conduct vis-a-vis Ms. Cannon and Ms. Power, the decision by ITT/Sheraton to terminate him was not based on his purported violation of corporate policy against sexual harassment. In support of his assertion that the misconduct finding was a pretext for other motives, he suggested that ITT/Sheraton fired him because of its unhappiness over his salary and benefits, or because senior corporate officials believed that he was insufficiently attentive to profit-making goals (Pl.'s Mem. at 19), or because the company wanted to save money by consolidating his position with that held by another ITT/Sheraton executive. (Id. at 15). None of these assertions is persuasive.

At trial, plaintiff offered evidence regarding a series of disputes with ITT management regarding his benefits. The issue arose partly as a result of a 1989 change in the tax code, under which plaintiff -- as well as many other ITT executives and Sheraton general managers -- became liable for income taxes on certain job benefits, such as telephone and car expense reimbursement, medical and dental benefits, and maid service. (Tr. at 1092, 1471-72). Although Sheraton attempted to reimburse plaintiff for this new tax exposure by providing him with a $ 35,300 salary increase (Tr. at 1051-52, 1079, 1085; Def.'s Exs. CI), plaintiff disputed the adequacy of the amount, and, in a series of memoranda, demanded reconsideration of

"virtually everything." (Tr. at 1078; Jt. Exs. 35-40). In effect, plaintiff was seeking greater compensation than any other general manager in the Sheraton chain, and ITT found plaintiff's demands "unreasonable." (Tr. at 1080, 1095-96).

Plaintiff also suggested at trial that ITT was concerned with his assertedly "excessive" use of medical and dental benefits. (Tr. at 1477; Jt. Exs. 33, 42). Plaintiff noted that his employment agreement provided for 100 percent medical coverage, as opposed to the 80 percent coverage received by other general managers in the United States. (Tr. at 1100, 1478). During an extended period in 1990 and 1991, plaintiff also insisted that he was entitled to 100 percent dental coverage, a demand that ITT disputed. (Tr. at 1102-03, 1474, 1478, 1517; Def.'s Ex. CT; Jt. Ex. 2). Indeed, no other ITT/Sheraton employee received comparable dental coverage. (Tr. at 1474-75, 1477-78, 1491).

These disputes over salary and benefits were embodied in a series of communications between plaintiff and the company and were reflected as well in internal company memoranda from January 1990 through at least October 1991. (Tr. at 1533-34; Def.'s Exs. BP, BQ, BR, BS, BU, BY, BZ, CA, CC, CE, CF, CG, CH, CI, CM, CN, CQ). Plaintiff, for his part, indicated to ITT/Sheraton his frustration and dissatisfaction with his compensation package and its tax consequences. (Def.'s Exs. BR, CC,

CF, CN).

Although ITT had previously indicated concern over the disparity between plaintiff's medical-dental benefits and those received by other employees, it did not act on the issue until October 1991, when plaintiff sought $ 12,000 in reimbursement for what was largely cosmetic dental work. (Tr. at 1477, 1517). In response to this bill, ITT's benefits chief, Michael O'Hara prepared a memorandum on October 4, 1991 for Jim Smith, discussing what action ITT should take regarding these expenses. (Jt. Exs. 2; Pl.'s Ex. 48). In the course of the memorandum, O'Hara expressed concern that plaintiff might incur additional dental expenses should things "heat up in New York" and suggested using the current dental issue to warn plaintiff that future medical expenses would be restricted. O'Hara further suggested that this warning be delivered in a manner that would not "arouse any suspicions regarding future employment status." (Jt. Ex. 2).

Plaintiff argues that the elliptical wording of this memorandum is weighty evidence that the company intended, well before the filing of any harassment charges, to bring about his termination, and that it was intent on concealing that decision from plaintiff during the early months after the hotel reopening so as not to prejudice its operations at that sensitive time. (Pl.'s Mem. at 17-19). I find this argument unpersuasive.

As explained by Mr. O'Hara, who was entirely

uninvolved in the decision to terminate Tischmann, there were ongoing discussions in the benefits department about plaintiff's medical benefits, and, as is often the case, bureaucratic inertia led to no action being taken on the matter. (Tr. at 1494, 1528). Seen in context, this memorandum was but one of a series of communications in which the fiscal monitors of the company were engaged in an effort to restrain expenses, but were constrained by other business concerns -- in this case the desire by the company not to pressure plaintiff to such an extent that he would leave his position, particularly at a crucial time for the St. Regis, shortly after its reopening. (Tr. at 1480-81, 1521).

In explaining his reference in the memorandum to things "heating up in New York", Mr. O'Hara noted his understanding that Tischmann had periodically expressed unhappiness with his situation with the company, and thus he was referring to the possibility that plaintiff might decide to leave but, before departing, take advantage of the asserted 100 percent dental coverage to accomplish substantial and expensive dental work. (Tr. at 1480-81, 1486). As for O'Hara's stated concern "not to arouse any suspicions regarding future employment status," he indicated that he was sensitive to the notion that if the company took the initiative by confronting Tischmann over his benefit entitlement claims, it might risk pushing him into an early departure, particularly given his previously

expressed unhappiness about his situation. Since the company wanted to avoid this result, O'Hara says, he was simply suggesting a way of raising the issue that would seem less confrontational. (Tr. at 1527).

Although the wording of this memorandum could, if read in isolation, be subject to varying interpretations, it scarcely demonstrates an early intention on the part of the company to rid itself of Tischmann. Indeed, quite to the contrary, it clearly reflects the desire of the company to keep him on board and reasonably contented, an inference that is further supported by ample evidence that, in professional terms, Tischmann was a very effective general manager and was so regarded by the management of ITT/Sheraton. (Tr. at 531, 570, 1418). Moreover, if the guiding design of top management was to replace plaintiff as quickly as possible after the opening of the St. Regis, the cited memorandum is a strange piece of evidence to cite for that proposition.

First, O'Hara was not in the line of authority that would have made such a decision and was unlikely to be privy to such a plot, much less to be the author of a document alluding to such an intention. Second, if the company had decided to terminate plaintiff within months, there would have been little reason to worry about his long-term medical-benefits arrangements with the company, since they would soon be ended. Third, there is simply no independent corroborative evidence of any intention by

management to sever its ties with plaintiff or to keep that intention a secret, nor is there any persuasive evidence of any motive for such a decision. Fourth, in any event the complaints of misconduct lodged by Ms. Cannon and Ms. Power nearly five months after O'Hara authored his memorandum stand on their own as a full and compelling basis for plaintiff's termination; there simply is no reason to view the earlier memorandum about $ 12,000 in dental payments as the key to why he was terminated five months later.[21]

Plaintiff also points to a second memorandum, authored by Jim Smith on October 18, 1991, and addressed to Ralph Pausig, the senior vice president and director of administration for ITT Corporation. In that memorandum Smith alluded to "the questions that surround Tischmann" and went on to discuss various options for limiting the expense of plaintiff's access to such hotel services as housing, food and housekeeping. (Jt. Ex. 3). Tischmann argues that Smith's reference to "questions" about him prefigures the corporate decision to fire him for reasons unrelated to the later harassment charges, and he suggests that the content of the memorandum reflects the desire of the company to rid itself of his salary and attendant

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[21] It is undisputed in the current record that, whatever the suggestions of O'Hara for dealing with the dental issue, the company took no steps to carry them out. (Tr. at 1494, 1528).

expenses.

Again, this argument misses the mark. The cited memorandum and a covering memorandum that went from Pausig to Rand Araskog, the chief executive officer of ITT, simply indicate that the company was considering three different options for providing various housekeeping and other services to Tischmann, with the goal of minimizing the expense and maintaining consistency in the company's treatment of all of its general managers. In fact, Smith recommended, and Araskog approved, the option of providing Tischmann restaurant, valet and housekeeping privileges, and they did so with the explicit goal of keeping the plaintiff contented. As Smith explained, and as is evident from the memorandum, the company was concerned to retain Tischmann, particularly during the sensitive period after the reopening. Consistent with that concern, Smith observed that another available option -- requiring Tischmann to live out of the hotel in a company-supplied apartment, with a salary supplement to cover his additional expenses -- "runs the risk of conveying a negative message to Tischmann who is already under intense pressure." (Jt. Ex. 3). In this context, the reference to "the questions which surround Tischmann" plainly refers, as Smith testified, to the concern that plaintiff might act on his occasionally expressed dissatisfaction and leave the St. Regis for a less pressured job elsewhere. (Tr. at 877, 884-85, 929). In sum, this document contradicts,

rather than supports, plaintiff's contention that the company had decided in the autumn of 1991 to terminate its ties to him.

Plaintiff also presented evidence at trial to suggest that ITT terminated him because of asserted poor performance or because he was not a profit-motivated general manager. (Tr. at 108-11, 124-25, 166-70; Pl.s' Exs. 7, 23). To this end plaintiff offered a memorandum dated April 1987 criticizing plaintiff's performance as general manager (Pl.'s Ex. 7) and a memorandum dated February 1991 detailing a $ 65 million cost overrun on the St. Regis renovation. (Tr. at 145; Pl.'s Ex. 23).

This argument is makeweight. The 1987 memorandum was prepared by a supervisor to address a variety of specific instances of poor service delivered by St. Regis personnel in 1986 and early 1987. This was more than five years before Tischmann was terminated, and in the interim ITT management had chosen to retain plaintiff to head the hotel both during the extended and extremely expensive renovation and in its crucial reopening in 1991. Moreover, the October 1991 memoranda alluded to in our prior discussion very clearly demonstrated that corporate management was extremely anxious to retain Tischmann throughout this entire period, a concern that was further reflected in the award to Tischmann as recently as 1991 of a merit bonus. (Tr. at 1089-90; Def.'s Ex. DA).

As for the memorandum concerning the large cost

overrun on the renovation, there is no indication that that overrun was attributed to plaintiff. Indeed, he testified that his part of the project came in on target. (Tr. at 306-07). It appears that plaintiff's real theory is that the chief executive officer of ITT,and perhaps others, viewed him unfavorably because they saw him as too interested in providing quality service to customers at the expense of budget restraint. Apart from the absence of any meaningful evidence of such criticism, much less any link to his termination, this argument collides with another argument hinted at by Tischmann, that his termination was attributable to his failure to obtain five-star status for the hotel, a ranking that was only obtained under his successor. (Tr. at 126). In any event, none of these arguments is supported by any meaningful evidence.

Plaintiff also offered evidence to suggest a long-term intention by ITT/Sheraton to replace him with another executive, by the name of Rick Segal. Segal had been working as the general manager of a Sheraton hotel in San Cristobal, Chile. (Tr. at 1008). In January 1991, he was transferred to Boston to report to John Kapioltas as the director of operations support for Sheraton. (Tr. at 1008, 1088, 1530). He was subsequently made director of luxury hotel operations. (Id.). In that role, Segal was assigned to provide support to plaintiff in the opening of the St. Regis, although plaintiff did not report to Segal. (Tr. at 1009). To accomplish this task, Segal was required to spend time

in New York, and was assigned an office at the St. Regis. (Id.). Subsequent to plaintiff's termination, Segal retained his own title and was also named the general manager of the St. Regis. (Tr. at 1037).

Plaintiff suggested that Segal's assumption of his title and job responsibilities was pre-planned by ITT. To this end, plaintiff introduced a post-it note which contained both plaintiff's birth date and the name of Rick Segal, and the words " $ 50.00." (Pl.'s Ex. 48). Plaintiff also noted that Segal continues to hold both titles while managing the St. Regis (Tr. at 207-09), thus apparently suggesting that the Boston job was a sinecure designed to position Segal to assume control of the hotel when Tischmann was dismissed.

This argument is thin to evanescent. Plaintiff offered no coherent explanation of why the post-it signifies any pre-existing intention by the company to remove him as general manager of the St. Regis, and the theory that Segal was pre-positioned to replace plaintiff is pure and unadulterated speculation. Moreover, the dual titles held by Segal suggest merely that the directorship of luxury operations is not a very time-consuming job and that Segal is presumably sufficiently efficient to handle both sets of responsibilities.

In further support of his pretext argument, plaintiff sought to demonstrate that ITT/Sheraton had given more lenient treatment to other employees accused of sexual

harassment. To this end, plaintiff offered testimony regarding a general manager and comptroller who worked at Sheraton hotels in Mexico. Both men were terminated for engaging in blatant quid pro quo sexual harassment but were also given severance pay. (Tr. at 960-61, 1242-44). Plaintiff also pointed to the company's handling of a complaint concerning the director of training in Sheraton's Boston office. (Tr. at 962). The substance of the claim in that case was that the director had asked an employee out for drinks several times, had taken her on a car ride under false pretenses, and had made comments that may have led other employees to believe that the two had spent the time engaged in sexual activity. (Tr. at 966-67, 1240-43; Pl.'s Ex. 49). He specifically denied the charges and was not terminated, but rather was given both verbal and written warnings that his conduct was inappropriate. (Tr. at 963-64, 1042-44; Pl.'s Ex. 49).

The proffered evidence does not demonstrate meaningful disparities in the treatment of similarly situated employees, much less suggest that plaintiff's termination for cause was pretextual. Uncontroverted trial testimony disclosed that the decision to grant severance benefits to the Mexican employees was predicated solely on the advice of Mexican counsel for ITT/Sheraton to the effect that payment of severance was mandatory under Mexican law despite the employees' conceded misconduct. (Tr. at 960-61, 1242-44). In short, ITT management concluded

that it had no discretion in the matter, whereas it plainly had the authority in the case of Mr. Tischmann to refuse payment.

As for the Boston director, the company could fairly have viewed his conduct as somewhat less serious than Tischmann's since no physical contact was involved, and the director was not accused of targeting several subordinates over an extended period of time. (Tr. at 1020-21). Moreover, the company could also have concluded that the misconduct, if borne out, did not justify termination because the director did not have a prior history of such difficulties and was not in the very prominent, indeed exalted, position occupied by Tischmann.

In any event, these other cases prove little, if anything, about the basis for the decision to terminate Tischmann. As noted, there was an ample factual basis for the company to conclude that he was guilty of substantial abuse of his authority and was in blatant violation of the very corporate rules that he was required to enforce at the hotel, and there were compelling reasons to sever all corporate ties with him as a consequence.

(c). The Procedural Fairness Argument

Plaintiff's remaining challenge to the decision of the administrator is, in effect, an attack on the procedural regularity or fairness of the investigation conducted by the company prior to his termination. There are several

problems with this line of argument.

First, as a technical matter, plaintiff does not have a right under ERISA or the plan to any particular form of process when the company is considering whether to discharge him for cause or deny him severance. A lack of coherence in the investigation or decisional procedure may be pertinent as evidence of either a complete lack of any factual basis for the "cause" finding or the existence of a motive for the termination other than the charged misconduct, but they do not compel an award of benefits. Moreover, even if we were to conclude that the employer had a nondisciplinary motive in effectuating the termination, that would not in itself entitle plaintiff to severance benefits. Rather, we would be called upon to perform the type of "mixed motive" analysis first formulated to deal with claims under the First Amendment and Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); Sagendorf-Teal, 100 F.3d at 274.

Second, we find no indication of any fundamental unfairness in the way that the company carried out its investigation and reached its decision. When the complaints first came to corporate headquarters in Boston, Mr. Kapioltas promptly directed that Carl Madda conduct an investigation at the St. Regis. Madda proceeded immediately to do so, and, through a series of interviews documented by his nearly contemporaneous and fairly

detailed notes, developed a substantial body of apparently reliable information on Tischmann's conduct. Moreover, although the typed report proved to be somewhat garbled, in that it left out several statements and misattributed one statement that was otherwise accurately summarized, those errors cannot be said to have prejudiced plaintiff. Indeed, one of the omitted summaries was of Madda's interview with Arthur Backal, who corroborated much of the account by Ms. Cannon concerning Tischmann's comments about the mirror in the restaurant and massages in the sauna. Moreover, the omissions contained no information that might be viewed as significantly helpful to plaintiff's case before the personnel committee.

Madda's report was then reviewed by the personnel committee and plainly was adequate to justify the conclusion of the committee that the charges by Cannon and Power were sufficiently well-grounded to require confronting Tischmann with them. Moreover, the details of the interviews reported by Madda were sufficient to permit the committee to reach the provisional conclusion that if the allegations were borne out, termination would be appropriate.

The committee then arranged for Smith, Pausig and Mr. Patton to re-interview the complainants, so as to confirm Madda's impression as to the credibility of the women. Following the satisfactory conclusion of those separate interviews, Smith and Patton conducted a lengthy

interview with Tischmann -- lasting approximately one-and-a-half hours (Tr. at 820) -- at which Smith went into each of the charges in detail and gave Tischmann the opportunity to respond.

These procedures were reasonable under the circumstances,[22] and, most importantly, offer not the slightest indication that the company's conclusion lacked a factual basis. Similarly, there is absolutely no basis for inferring from the use of these procedures that the company was intent upon ridding itself of Tischmann for other reasons and was going through the investigative process merely as a cover to conceal such a purpose.

4. De Novo Review

Even if we were to review the administrator's decision under the more searching de novo standard, we would come to the same conclusion. As already noted, based on their testimony at trial we find Ms. Cannon and

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[22] Plaintiff makes much of the fact that Smith refused to show him the written complaints drafted by Ms. Cannon and Ms. Power. Even if other corporate officers might have handled this matter differently (Tr. at 1452), it is entirely inconsequential for the issues at hand. Smith credibly testified that he read to Tischmann each of the allegations (Tr. at 819, 935, 940-41, 943, 947-48), and also went over Madda's report with the plaintiff. (Tr. at 819, 947-48). This was surely adequate to give plaintiff knowledge of the charges and to elicit his version of the facts.

Ms. Power to be entirely credible in recounting their dealings with the plaintiff. As for Mr. Tischmann's account of these incidents, his testimony was equivocal as to some of the charges -- typified by failures to recall incidents rather than denials (Tr. at 241, 293-94, 342) -- and he denied certain of the more lurid events.[23] To the extent that his testimony conflicted with that of the complainants,[24] I reject his version as not worthy of belief.

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[23] Plaintiff did admit the conversation in the Lespinasse kitchen, an event, I note, that was witnessed by a number of individuals. (Tr. at 243-44)

[24] For example, plaintiff denied ever giving Cannon a rose or asking for a kiss. (Tr. at 216, 326-27). He denied following her into a closet and subjecting her to sexual innuendo. (Tr. at 217-222). Despite extensive corroboration by other witnesses, he denied asking Ms. Cannon about a mirror over her bed or inviting her into the sauna for massages. (Tr. at 223-27). He further denied ever touching Ms. Cannon in an inappropriate way. (Tr. at 229-232). As for Ms. Power's allegations, plaintiff denied ever touching her breasts or knees. He also denied flirting or engaging in double entendres with Maria Peralta (Tr. at 241, 337-38) and in fact claimed that he did not know the meaning of the word "spank" prior to June 1992. (Tr. at 237-39). Plaintiff also claimed that he could not recall asking Power to kiss him on the cheek, although he vividly recounted a separate incident in which Power allegedly kissed him of her own accord. (Tr. at 241).

I also find that the account provided at trial by Mr. Madda as to the substance of what various witnesses told him during his investigation was credible, as was the testimony of Mr. Smith that plaintiff did not deny the accusations when confronted with them. Even without Mr. Tischmann's virtual admission, the statements of the witnesses, in conjunction with the documented complaints of Ms. Cannon and Ms. Power, would have provided ample justification for the conclusion of the company that Mr. Tischmann had engaged in repeated acts of sexual harassment and that he had done so after a number of warnings against such behavior and in full knowledge of his responsibilities as the general manager of the St. Regis to enforce the very rules that he was systematically violating.

Given these findings, it follows inexorably that the decision of the company to terminate plaintiff for such misconduct was amply justified. It is equally apparent that the conclusion of the plan administrator that plaintiff had been terminated for cause was correct. His refusal to pay severance benefits is therefore unassailable.

III. The Labor Law Claim

Accompanying plaintiff's claim for denial of severance benefits was a separate but related claim under section 190 of the New York Labor Law, which permits an award of attorney's fees and liquidated damages if the denial of benefits was "willful." The question of willfulness

was submitted to the jury, which found against plaintiff.

Neither party targets this verdict on the post-trial motions, but in view of our conclusion that the ITT/Sheraton plan was covered by ERISA, we must briefly address it. The short answer as to the appropriate disposition of the claim is that it must be dismissed as preempted under ERISA, since it would impose adverse consequences on the employer for decisions made on an application for ERISA benefits. See, e.g., Ingersoll-Rand v. McClendon, 498 U.S. 133, 143-45, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990); Romney v. Lin, 94 F.3d 74, 82 (2d Cir. 1996), reh'g denied, 105 F.3d 806 (2d Cir. 1997). Alternatively, I note that, even if not preempted, the claim would fail in view of our conclusion that the denial of benefits was justified.

CONCLUSION

Defendant's Rule 50 request to set aside the jury verdict for insufficiency of the evidence is denied. Defendant's request to reconsider the status of the ITTSESPP as an ERISA plan is granted. On reconsideration, we hold that the ITTSESPP is an ERISA plan. We therefore address the merits of plaintiff's benefits claim and uphold the decision of ITT/Sheraton Corporation to deny plaintiff severance benefits. We further hold that plaintiff's Labor Law claim is preempted by ERISA. Accordingly, judgment will be entered dismissing the complaint.

B-73
District Court Opinion (Magistrate Judge Dolinger)

Dated: New York, New York
April 18, 1997

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

Appendix C
District Court Opinion (Judge Kram)

PETER TISCHMANN, Plaintiff,
-against-
ITT/SHERATON CORPORATION, Defendant.

92 Civ. 2505 (SWK)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
882 F. Supp. 1358; 1995 U.S. Dist. LEXIS 4506;
68 Fair Empl. Prac. Cas. (BNA) 1665;
2 Wage & Hour Cas. 2d (BNA) 1745

April 7, 1995, Decided
April 10, 1995, FILED

COUNSEL:

For Plaintiff: Eckhaus & Olson, New York, New York, By: Steven G. Eckhaus, Jonathan C. Moore, Esq., New York, New York.

For Defendant: Jacob, Medinger & Finnegan, New York, New York, By: Peter A. Cross, Max H. Crohn, Jr., Jamie Andra Gavrin, Jun Chul Whang.

JUDGES: SHIRLEY WOHL KRAM,
United States District Judge

OPINION: MEMORANDUM OPINION AND ORDER
SHIRLEY WOHL KRAM, U.S.D.J.

In this diversity action arising out of an allegedly wrongful termination of employment, defendant ITT/Sheraton Corporation ("Sheraton") moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the amended complaint. Plaintiff Peter Tischmann ("Tischmann") opposes the motion. For the reasons set forth below, Sheraton's motion is granted in part and denied in part.

BACKGROUND[1]

I. The Parties

Defendant Sheraton, a Delaware corporation headquartered in Massachusetts, owns and operates one of the leading hotel chains in the world. The St. Regis Hotel (the "St. Regis") is Sheraton's flagship hotel in New York City.

In 1972, Tischmann commenced employment at Sheraton, working in various positions for approximately twenty years. In July 1985, after working at several Sheraton hotels around the world, Tischmann was appointed general manager of the St. Regis. As general manager, Tischmann's responsibilities included managing

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[1] Unless otherwise indicated, the following statement of undisputed facts is derived from Defendant's 3(g) Statement of Material Facts and Plaintiff's Response to Defendant's 3(g) Statement of Material Facts.

the St. Regis staff and supervising the hotel's daily operations.

Initially, Tischmann served as general manager pursuant to a written employment agreement dated November 24, 1986 (the "Contract"). The Contract, covering the period of December 1, 1986 through November 30, 1988, provided a base salary of $ 92,000 per year. In addition to his base salary, Tischmann received: (1) substantial performance bonuses; (2) a rent-free apartment; (3) a partial college scholarship for his daughter; (4) participation in Sheraton's Investment and Savings Plan; (5) participation in Sheraton's Retirement Plan; (6) life insurance; (7) stock options; and (8) various other perquisites. The Contract expressly provided that the "agreement will be governed by and construed in accordance with laws of the State of Massachusetts." Contract, annexed to Pl.'s Resp. to Def.'s Rule 3(g) Statement as Exh. "7," at 3.

Tischmann was also eligible to participate in Sheraton's Incentive Compensation Plan (the "Incentive Plan"). Under the Incentive Plan, general managers were awarded bonuses commensurate with the performance of their hotels. The Incentive Plan defined successful management as "encompassing both achievement of your own individual objectives and contribution as a team member toward overall ITT Sheraton objectives." Incentive Plan, anexed to Def.'s Exhibits as Exh. "18," at 1.

Sheraton and Tischmann renewed the Contract for two one-year periods, effectively extending the Contract through November 30, 1990. At that time, however, Sheraton decided not to enter into or extend employment contracts with any of its employees. See Affidavit of James P. Smith, sworn to on 4/14/94, at P 15. As a result, the Contract expired on November 30, 1990 and Tischmann continued to work at Sheraton without a written employment agreement.

II. The Severance Plan

In the absence of an employment agreement, however, Sheraton created a Special Executive Severance Pay Plan (the "Severance Plan") to cover certain Sheraton executives, including Tischmann, in the event of involuntary termination. The Severance Plan provided: "If the Company terminates an Executive's employment, the Executive shall be provided severance pay in accordance with the terms of this Plan except where the Executive . . . is terminated for cause." Severance Plan, annexed to the Def.'s Exhibits as Exh. "16," at 1. Payment under the Severance Plan would be "paid in the form of periodic payments according to the regular payroll schedule . . . provided that ITT reserves the right at any time to pay the remaining severance pay in the form of a discounted lump sum." Id. The Severance Plan provided further:

> If during the period an Executive is receiving Salary Continuation, the Executive (i) engages in any

> activity which is inimical to the best interests of the Company; . . . or (vi) fails to comply with applicable provisions of the ITT Code of Conduct or applicable ITT Corporate Policies or any applicable ITT Subsidiary Code or policies, then the Company will have no further obligation to provide severance pay.

Id. at 3. The Severance Plan also noted that it is "not a contract of employment, does not guarantee the Executive employment for any specified period and does not limit the right of the Company to terminate the employment of the Executive at any time." Id. at 5.

III. Sexual Harassment Charges

During the relevant time period, Sheraton had in place a Code of Corporate Conduct (the "Code of Conduct") as well as a policy against sexual harassment (the "Sexual Harassment Policy"). The Code of Conduct provided, in relevant part:

> Sexual harassment in any form will not be tolerated. All supervisors, managers, and executives of ITT must be alert to the possible presence of sexual harassment in the workplace, take appropriate steps to prevent it, and take action if such harassment occurs. Appropriate action may range from the issuance of a warning to dismissal.

Code of Conduct, annexed to Def.'s Exhibits as Exh. "6," at 5. The Sexual Harassment Policy, printed in Sheraton's

Personnel Policy and Procedure Manual (the "Personnel Manual"), stated:

> It will be the responsibility of the management team of each hotel to ensure that all hotel employees are allowed to work in an environment free of sexual harassment. Hotel staff will be informed of this policy and made aware of what steps to take if they feel they are being harassed. When notified of an alleged violation, management will react immediately, investigate the allegation(s) and take appropriate action. It should be made clear to all staff members that sexual harassment will not be tolerated.

Sexual Harassment Policy, annexed to Def.'s Exhibits as Exh. "8."

In July 1988, the St. Regis closed for extensive renovations and Tischmann and other St. Regis staff worked at the Sheraton Center in New York City on assignments related to the anticipated re-opening of the St. Regis in September 1991. At that time, Sheraton decided to name Tischmann as managing director of the newly-renovated St. Regis. Shortly thereafter, Tischmann hired other management-level employees, including Ann Power ("Power") for the position of director of human resources and Sarah Cannon ("Cannon") for the position of assistant director of human resources.

In February 1992, Mary Ann Palmer ("Palmer"),

Sheraton's vice president and director of human resources for Sheraton North America-East, notified James P. Smith ("Smith"), Sheraton's executive vice president and director of administration, that Power and Cannon had come forward with complaints that Tischmann had sexually harassed them at work.

Power and Cannon were instructed to submit written statements to Smith, describing their allegations in detail. In her written statement, Power alleged six separate incidents in which Tischmann had either touched her buttocks, requested kisses, inquired about her sex life or otherwise behaved inappropriately. Similarly, Power's written statement alleged that Tischmann had touched her inappropriately and made several sexually suggestive remarks. Upon receiving the written submissions, Smith consulted with John Kapioltas ("Kapioltas"), Sheraton's president, who decided to assign Carl J. Madda ("Madda"), Sheraton's vice president and director of labor relations, to investigate the charges against Tischmann.

On March 5, 1992, Madda began an on-site investigation at the St. Regis. Madda immediately advised Tischmann that he had been assigned to investigate sexual harassment complaints levied against him by certain female workers at the hotel. Madda proceeded to interview Power and Cannon, who described several incidents of sexual harassment perpetrated by Tischmann.

During the investigation, Madda interviewed other

St. Regis employees, including Eleanor Ribaudo and Anne Barzola, who complained that Tischmann had engaged in unwelcome conduct towards them as well. Madda also interviewed two other management-level employees at the St. Regis, who confirmed certain of Power's and Cannon's accounts. At about the same time, Denise Flanders ("Flanders"), a former Sheraton employee, came forward with complaints of similar conduct by Tischmann. On March 6, 1992, Madda compiled the results of his investigation and submitted a written report to Smith.

Smith reviewed Madda's report with Kapioltas, who decided that Sheraton's personnel committee, composed of several members of Sheraton's board of directors, should consider the charges and determine an appropriate remedy. On March 12, 1992, the personnel committee, reviewed the charges against Tischmann. The personnel committee determined that the charges were credible and, as Tischmann's conduct was in violation of the Code of Conduct and the Sexual Harassment Policy, his employment should be terminated.

After the meeting, Ralph W. Pausig ("Pausig") and Smith, two members of the personnel committee, met with Power and Cannon separately as a final verification of their allegations. Pausig and Smith then confronted Tischmann with the charges and terminated his employment. Although Sheraton claims that Tischmann did not dispute the substance of the complaints, Tischmann maintains that he

consistently has denied all allegations of sexual harassment.[2] See Deposition of Peter Tischmann, undated, annexed to Def.'s Rule 3(g) Statement as Exh. "3," at 348.[3]

In addition to terminating Tischmann's employment, Sheraton determined not to pay him any bonus under the Incentive Plan for 1991. According to Sheraton, as the St. Regis was under construction throughout most of 1991, it could not calculate Tischmann's bonus based on the hotel's performance, but instead was forced to base his bonus on personal performance. In light of Sheraton's determination that Tischmann had violated the Code of Conduct and the Sexual Harassment Policy, it decided that a bonus under the Incentive Plan was not warranted. Tischmann disputes this claim and points out that, prior to the harassment charges, Sheraton had determined that he had achieved all

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[2] On January 11, 1993, an Administrative Law Judge for the New York State Department of Labor determined that Tischmann's alleged conduct "did not constitute sexual harassment." See Department of Labor Decision, annexed to Pl.'s Resp. to Def.'s Rule 3(g) Statement as Exh. "1."

[3] Although both parties have submitted excerpts from Tischmann's deposition testimony, neither party has provided the Court with that portion of the transcript indicating the date of the deposition. The parties are reminded to submit complete information for sources upon which they intend to rely.

goals for 1991 and should receive a bonus in the amount of $ 34,100 under the Incentive Plan.

Similarly, Sheraton decided not to extend any severance pay pursuant to the terms of the Severance Plan. Specifically, Sheraton concluded that its obligation to pay severance was discharged by Tischmann's violation of Sheraton policy. Tischmann disputes the underlying sexual harassment claims, however, and argues that there were no grounds for Sheraton's decision to deny him severance pay.

IV. Alleged Disclosures

Shortly after Tischmann's discharge, accounts of the dismissal appeared in the press. The parties dispute the source of these press accounts and whether Sheraton may be held responsible for any alleged disclosures. According to Sheraton, Tischmann was the first person to disclose the fact that his employment had been terminated as a result of sexual harassment charges. Specifically, Sheraton alleges that Tischmann immediately informed his secretary and another St. Regis employee of the reason for his termination. Tischmann disputes this claim and contends that Sheraton employees, including Madda and Cannon, informed a dozen other Sheraton employees as well as several non-Sheraton employees about the allegations prior to the time that any disclosures were made by him.

Sheraton maintains further that it did not disclose the specific reason for Tischmann's termination despite several inquiries from the press. Rather, Sheraton decided

to adopt a public position that Tischmann was discharged due to a change in management. For example, an article appearing in Crain's New York Business ("Crain's") reported that Sheraton "won't comment on Mr. Tischmann's departure, and claims that the St. Regis is meeting its projections." See Crain's Article, annexed to Def.'s Exhibits as Exh. "32." Similarly, in response to a request from the New York Observer to confirm a forthcoming article revealing that sexual harassment allegations had been lodged against Tischmann, Sheraton stated:

> We are not defining the management decision as actual dismissal. As well, the decision [to discharge] was made after careful and deliberate consideration by the senior management of ITT Sheraton. We are satisfied and we are confident that all steps were taken to ensure fairness to all parties involved and to ensure the continuance of high level performance at the St. Regis.

See New York Observer Inquiry, annexed to Def.'s Exhibits as Exh. "28," at 2. According to Tischmann, however, Sheraton's failure to deny specific questions by reporters regarding allegations of sexual harassment implicitly confirmed the sexual harassment charges.

V. The Present Action

On March 9, 1993, Tischmann filed the instant amended complaint seeking reinstatement, compensatory

and punitive damages, costs and attorneys' fees. The gravamen of the amended complaint is that Sheraton's stated reason for discharging Tischmann is pretextual and that, in fact, Sheraton sought to remove Tischmann from his position to (1) save money by reducing its work force; (2) mislead Sheraton's stockholders and the financial community;[4] and (3) oust an individual whose management style, age and national origin did not project the proper business image. See Amended Complaint at PP 21, 22, 24-27.

The amended complaint sets forth eleven causes of action for: (1) breach of contract (First Claim for Relief); (2) breach of an implied covenant of good faith and fair dealing (Second Claim for Relief); (3) wrongful discharge in violation of public policy (Third Claim for Relief); (4) intentional infliction of emotional distress (Fourth Claim for Relief); (5) negligent infliction of emotional distress (Fifth and Seventh Claims for Relief); (6) breach of promise to pay severance and pension benefits (Sixth and Eighth Claims for Relief); (7) denial of wages under New York Labor Law § 190 et seq. (Ninth Claim for Relief); (8) slander (Tenth Claim for Relief); and (9) compelled

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[4] In brief, Tischmann alleges that stockholders were concerned about the size of compensation packages available to Sheraton senior executives. According to Tischmann, discharging him deflected criticism away from Sheraton's poor performance in managing its hotels.

self-publication defamation (Eleventh Claim for Relief).[5]

Sheraton now moves, pursuant to Federal Rule of Civil Procedure 56, for summary judgment dismissing the amended complaint. The Court shall address Sheraton's motion with respect to each claim in turn.

DISCUSSION

I. Standard of Law

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970), and may discharge this burden by demonstrating to the court that there is an absence of evidence to support the nonmoving party's case on which that party would have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The nonmoving party then has the burden of coming forward

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[5] Although in his Opposition Memorandum of Law, Tischmann refers to an additional claim for intentional interference with his contractual relations, no such claim appears in the amended complaint.

with specific facts showing that there is a genuine issue for trial Fed. R. Civ. P. 56(e), by "a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322.

The court "must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion." Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir. 1987); Eastway Constr. Corp. v. New York, 762 F.2d 243, 249 (2d Cir. 1985); see also Adickes v. S.H. Kress & Co., 398 U.S. at 158-59; Gallo v. Prudential Residential Serv., 22 F.3d 1219, 1223 (2d Cir. 1994). But the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), and grant summary judgment where the nonmovant's evidence is merely colorable, conclusory, speculative or not significantly probative. Id. at 249-50; see Knight v. United States Fire Ins. Co., 804 F.2d 9, 12-15 (2d Cir. 1986), cert. denied, 480 U.S. 932, 94 L. Ed. 2d 762, 107 S. Ct. 1570 (1987); Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 45 (2d Cir. 1986), cert. denied, 479 U.S. 1088, 94 L. Ed. 2d 151, 107 S. Ct. 1295 (1987). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

To determine whether the moving party has met his or her burden, the court must focus on both the materiality and the genuineness of the factual issues raised by the nonmovant. As to materiality, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, 477 U.S. at 248. A dispute over irrelevant or unnecessary facts will not preclude summary judgment, id., but the presence of unresolved factual issues that are material to the outcome of the litigation mandates a denial of summary judgment. See, e.g., Knight v. United States Fire Ins. Co., 804 F.2d at 11-12.

Once the nonmoving party has successfully met the burden of establishing the existence of a genuine dispute as to an issue of material fact, summary judgment must be denied unless the moving party comes forward with additional evidence sufficient to establish his or her burden under Rule 56. Celotex Corp. v. Catrett, 477 U.S. at 330 & n.2 (Brennan, J., dissenting). In sum, if the court determines that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587 (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575

(1968)).

II. Choice of Law

As a threshold matter, the Court must determine whether Massachusetts or New York state law applies to plaintiff's claims. Tischmann argues that Massachusetts law governs on the grounds that (1) the expired Contract expresses the parties' mutual intent to apply Massachusetts law; or (2) even in the absence of mutual intent, New York's traditional choice of law rules require the application of Massachusetts law. The Court disagrees.

A federal court in a diversity case must look to the choice of law rules of the state in which it sits to resolve conflict of law issues. AroChem Int'l, Inc. v. Buirkle, 968 F.2d 266, 269-70 (2d Cir. 1992) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)); G.D. Searle & Co. v. Medicore Communications, Inc., 843 F. Supp. 895, 905 n.5 (S.D.N.Y. 1994). Thus, the Court must examine New York's choice of law principles to determine whether to apply Massachusetts or New York law to Tischmann's claims.

In determining the law that governs the contractual relationship between the parties, New York courts apply a "paramount interest" test, under which the court must apply the law of the state with the "greatest interest in the litigation." Crescent Oil & Shipping Servs., Ltd. v. Phibro Energy, Inc., 929 F.2d 49, 52 (2d Cir. 1991). In

determining which state's interest is paramount, "the facts or contacts which obtain significance . . . are those which relate to the purpose of the particular law in conflict." Hutner v. Greene, 734 F.2d 896, 899 (2d Cir. 1984). With respect to employment contracts, "the matters of performance and breach are to be determined by the law of the place of performance, or, in the alternative, by the law of the state having the most significant contacts with the matter in dispute." Frishberg v. Esprit De Corp., 778 F. Supp. 793, 801 (S.D.N.Y. 1991) (quoting Peters v. MCI Telecommunications Corp., 685 F. Supp. 411, 412 (S.D.N.Y. 1988)), aff'd, 969 F.2d 1042 (2d Cir. 1992).

Similarly, with respect to a plaintiff's claims sounding in tort, New York courts adopt an "interest analysis" test, requiring application of the law of the state with the greatest interest in the outcome of the litigation. Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 491 N.Y.S.2d 90, 95, 480 N.E.2d 679 (1985). The significant factors to be considered in tort actions are "almost exclusively, the parties' domiciles and the locus of the tort." Id. Of these factors, the locus jurisdiction "has the predominant interest where rules regulating conduct are at issue, because of its interest in affecting the conduct of those who act within the jurisdiction and of a reliance interest on the part of actors whose conduct is at issue." AroChem Int'l, Inc. v. Buirkle, 968 F.2d at 270 (citing Schultz v. Boy Scouts of America, Inc., 491 N.Y.S.2d at

96).

In the present case, the Court finds that Tischmann's claims sounding both in breach of contract and tort are governed by New York law. Tischmann is a New York domiciliary and worked in New York as a St. Regis employee. Most significantly, all of the incidents forming the basis for the amended complaint occurred in New York. Under these circumstances, it is clear that New York has the greater interest in determining the outcome of the litigation.

Tischmann's argument that the Contract evinces the parties' intent to apply Massachusetts is unavailing. While Tischmann is correct that contracting parties may select the body of law to apply to an agreement, see Walter E. Heller & Co. v. Video Innovations, Inc., 730 F.2d 50, 52 (2d Cir. 1984); Curtis v. Harry Winston, Inc., 653 F. Supp. 1504, 1509 (S.D.N.Y. 1987) (citing Silverman v. Worsham Bros. Co., 625 F. Supp. 820, 826 (S.D.N.Y. 1986)), the Contract upon which Tischmann relies expired more than fifteen months prior to the filing of the complaint. Tischmann is unable to offer any support for the proposition that parties are bound to the terms of an expired contract. Accordingly, the Court finds that New York law applies to Tischmann's claims.

III. Breach of Contract

In his First Claim for Relief, Tischmann maintains that a contract of employment arose out of (1) unspecified

language in the Personnel Manual; (2) the expired Contract; (3) Tischmann's reasonable expectations; and (4) unspecified verbal statements made by Sheraton executives that Tischmann could expect continued employment. According to Tischmann, Sheraton breached its contractual obligations when it discharged him in March 1992. The Court finds that this claim lacks merit.

Under New York law, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be hiring at will, terminable at any time by either party." Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 514 N.Y.S.2d 209, 211, 506 N.E.2d 919 (1987) (citing Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416 (1895)). An employer may discharge an at-will employee at any time with or without cause. Allen v. City of Yonkers, 803 F. Supp. 679, 709 (S.D.N.Y. 1992) (citing Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017, 1020-21 (2d Cir. 1985)); see also Jones v. Dunkirk Radiator Corp., 21 F.3d 18, 21 (2d Cir. 1994) (stating that, under New York's employment at-will doctrine, "an employer has a nearly unfettered right to discharge an employee").

In the case at hand, the Court finds that Tischmann became an at-will employee on November 30, 1990 upon the expiration of the Contract. There is no support for Tischmann's claim that various documents and oral promises constructed an employment contract where none

existed. In fact, documents such as the Incentive Plan expressly provided that they were not contracts of employment. The Court finds further that, in light of Sheraton's stated decision not to continue providing employment contracts, any isolated promises of continued employment are insufficient evidence of an express agreement to alter Tischmann's at-will status. See, e.g., Cucchi v. New York City Off-Track Betting Corp., 818 F. Supp. 647, 652 (S.D.N.Y. 1993) (rejecting plaintiff's attempt to portray oral promises of continued employment as binding agreement). As Tischmann was an at-will employee, Sheraton was entitled to terminate his employment with or without cause. Accordingly, Sheraton's motion for summary judgment dismissing the First Cause of Action is granted.

IV. Implied Covenant of Good Faith

Tischmann's Second Cause of Action sets forth a claim for a breach of an implied covenant of good faith and fair dealing. This claim appears to be based upon Massachusetts law which curtails the ability of employers to discharge at-will employees without cause under certain circumstances. It is well-settled under New York law, however, that an implied covenant of good faith does not attach to employment contracts governed by New York law. Peterson v. Insurance Co. of N. Am., 822 F. Supp. 1040, 1044 (S.D.N.Y. 1993), rev'd on other grounds, 40 F.3d 26 (2d Cir. 1994); Sabetay v. Sterling Drug, Inc.,

514 N.Y.S.2d at 212; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 237, 448 N.E.2d 86 (1983). As the Court has determined that New York law applies in the instant case, Sheraton's motion for summary judgment dismissing the Second Claim for Relief is granted.[6]

V. Infliction of Emotional Distress

In his Fourth, Fifth and Seventh Claims for Relief, Tischmann sets forth claims for intentional and negligent infliction of emotional distress.[7] Sheraton argues that these claims should be dismissed as an improper attempt to circumvent New York's at-will employment rule. In the alternative, Sheraton contends that both claims fail on the merits as a matter of law.

It is well-established that a plaintiff may not "subvert the traditional at-will contract rule by recasting his cause of action in terms of a tort of intentional infliction of emotional distress." Murphy v. American Home Prods. Corp., 461 N.Y.S.2d at 236. This rule is based on the

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[6] Similarly, in his Third Claim for Relief, Tischmann argues that he was wrongfully discharged in violation of Massachusetts public policy. As Massachusetts law does not apply, however, this claim must also be dismissed.

[7] The Fifth and Seventh Claims for Relief essentially set forth the same claim based on negligent infliction of emotional distress.

principle that there is no cause of action for abusive or wrongful discharge of an at-will employee. Id.; see also Cartelli v. Lanier Worldwide, Inc., 872 F. Supp. 1253, 1256 n.2 (S.D.N.Y. 1995) (noting that permitting an employment dispute to proceed under the guise of an intentional infliction of emotional distress claim would "make demotion (and even more so dismissal) an extremely high risk step for any employer to take"); Ingle v. Glamore Motor Sales, Inc., 73 N.Y.2d 183, 538 N.Y.S.2d 771, 773-74, 535 N.E.2d 1311 (1989) (stating that New York courts "decline[] to allow the use of substitute nomenclature or causes, such as prima facie tort or intentional infliction of emotional distress, to bootstrap the threshold deficiency in a wrongful discharge claim").

In light of these authorities, the Court finds that Tischmann's claims based on negligent and intentional infliction of emotional distress are not actionable under New York law, as both claims would circumvent New York's at-will employment rule. In fact, these claims merely rehash the same facts regarding Sheraton's decision to discharge Tischmann, characterizing the misconduct as separate tort claims. Accordingly, Sheraton's motion for summary judgment dismissing the Fourth, Fifth and Seventh Claims for Relief is granted.[8]

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[8] As the Court finds that New York law does not (continued...)

VI. Severance Pay Claims

In Tischmann's Sixth and Eighth Claims for Relief, Tischmann asserts that Sheraton breached its promise to pay severance and pension benefits in the event of involuntary termination. Sheraton argues that, to the extent these claims seek redress for failure to provide payment pay pursuant to the Severance Plan, they are barred by the Employee Retirement Income Security Act of 1974 ("ERISA"). In opposition, Tischmann contends that these claims are not subject to ERISA preemption as the Severance Plan is not a "plan" within the meaning of the statute.

Congress enacted ERISA "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." Massachusetts v. Morash, 490 U.S. 107, 112, 104 L. Ed. 2d 98, 109 S. Ct. 1668 (1989). ERISA § 1003(a) provides that ERISA shall apply to "any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a). An "employee benefit plan" is defined as "an employee welfare

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[8](...continued)
permit the substitution of plaintiff's intentional and negligent infliction of emotional distress claims in lieu of a wrongful discharge claim, the Court need not address the merits of those claims.

benefit plan or an employee pension benefit plan or [both]." 29 U.S.C. § 1002(3). An "employee welfare benefit plan" in turn is defined as:

> Any plan, fund, or program which has heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) [medical] benefits in the event of . . . unemployment . . . , or (B) any benefit described in section 302(c) of the Labor Management Relations Act [pertaining to severance benefits].

29 U.S.C. § 1002(1).

ERISA also contains a broad preemption provision, embodied in ERISA § 1144(a), which provides, in relevant part, that its regulatory provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [§ 1003(a)]." 29 U.S.C. § 1144(a). Accordingly, "if an employer's program is an employee welfare benefit plan, ERISA preempts state laws that 'provide an alternative cause of action to employees to collect benefits protected by ERISA.'" James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d 463, 465 (2d Cir. 1993) ("James") (quoting Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir.), cert. denied, 493

U.S. 811, 107 L. Ed. 2d 25. 110 S. Ct. 57 (1989)).

In order for ERISA to preempt state law, however, the employer's policy must constitute a "plan" within the meaning of ERISA. See Fort Halifax Packing Co. v. Coyne ("Fort Halifax"), 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987); James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d at 467. In Fort Halifax, the Supreme Court held that ERISA did not preempt a Maine statute that required severance pay for certain workers when an employer decided to close a plant. Fort Halifax Packing Co. v. Coyne, 482 U.S. at 5. The Court determined that the state law was not preempted "because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under [ERISA]." Id. at 6. The Second Circuit Court of Appeals, addressing this issue in James, similarly held that an employer's decision to provide a lump sum severance payment upon an employee's termination did not constitute an ERISA "plan" and thus did not preempt state law. James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d at 466. The Court reasoned that:

> a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial

coordination and control.

Id. (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 12, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987)); see also Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254, 257 (8th Cir. 1994) ("The pivotal inquiry is whether the plan requires the establishment of a separate, ongoing administrative scheme to administer the plan's benefits."); Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1538 (3rd Cir. 1992) (finding that a single disbursement to each employee did not constitute an ERISA "plan" as it did not require an ongoing administrative scheme).

Fort Halifax and James are controlling in the case at hand. Specifically, the Severance Plan does not require an ongoing administrative program to meet Sheraton's obligations to its covered employees. Rather, the Severance Plan envisions payments pursuant to a "regular payroll schedule," or, if Sheraton chooses, in a "discounted lump sum." See Severance Plan, annexed to Def.'s Exhibits as Exh. "16," at 1. Although the implementation of the Severance Plan entails certain numerical calculations, see Affidavit of David H. Rhael, sworn to on Oct. 12, 1994, at P 6, it does not require the establishment of "'a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits,' the protection of which is the purpose of ERISA preemption." James v. Fleet/Norstar Fin. Group, Inc., 992 F.2d at 467 (quoting Fort Halifax Packing Co. v.

Coyne, 482 U.S. at 9). Thus, the Court holds that the Severance Plan is not an "employee welfare benefit plan" within the meaning of ERISA. Accordingly, Sheraton's motion for summary judgment dismissing Tischmann's Sixth and Eighth Claims for Relief on preemption grounds is denied.

VII. Denial of Wages

Tischmann's Ninth Cause of Action sets forth a claim pursuant to New York Labor Law § 190 et seq. In brief, Tischmann seeks attorneys' fees and liquidated damages based on the contention that Sheraton's refusal to pay him severance, an annual bonus under the Incentive Plan and other benefits constitutes a willful denial of wages in violation of New York law. Sheraton argues that it is entitled to summary judgment on this claim on the ground that Tischmann has failed to establish any substantive wage claim as a basis for the imposition of New York labor law remedies.

New York Labor Law Section 190(1) ("Section 190(1)") defines wages as:

> the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term 'wages' also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article.

N.Y. Lab. Law § 190(1) (McKinney 1993). New York

Labor Law Section 198(1-a) ("Section 198(1-a)") provides:

> In any action instituted upon a wage claim by an employee . . . , the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

N.Y. Lab. Law § 198(1-a) (McKinney 1993). The statutory remedy of an award of attorney's fees and liquidated damages is "limited to actions for wage claims founded on the substantive provisions of Labor Law article 6 [Labor Law §§ 190-99]." Gottlieb v. Kenneth D. Laub & Co., 82 N.Y.2d 457, 605 N.Y.S.2d 213, 217, 626 N.E.2d 29 (1993); see also Parker v. Revlon, Inc., A.D.2d , 621 N.Y.S.2d 306, 307 (1st Dep't 1995) (same).

According to Sheraton, Tischmann cannot recover under Section 198(1-a) because (1) the severance pay claim is preempted by ERISA; (2) incentive compensation does not fit within the definition of "wages;" and (3) the amended complaint fails to set forth any substantive claim based on New York Labor Law § 190 et seq. As the Court has determined that Tischmann's claim based on the denial of severance pay is not preempted by ERISA, see supra at 19-23, Sheraton's contention with respect to this portion of

the claim is denied.[9]

With respect to the bonus claim, however, the Court finds that the 1991 unpaid bonus does not constitute "wages" within the meaning of Section 190(1-a). Under New York law, incentive compensation based on factors falling outside the scope of the employee's actual work is precluded from statutory coverage. See, e.g., Samuels v. Thomas Crimmins Contracting Co., No. 91 Civ. 6657, 1993 WL 36168, at(S.D.N.Y. Feb. 9, 1993) (finding a promised bonus to be incentive compensation not covered by Section 190(1) as it was not based on the employee's individual performance); Dean Witter Reynolds, Inc. v. Ross, 75 A.D.2d 373, 429 N.Y.S.2d 653, 658 (1st Dep't 1980) (holding that an incentive plan tying an employee's bonus to the overall output rate of the department falls outside the purview of Section 190(1)); but see Westheim v. Elkay Indus., Inc., 166 A.D.2d 318, 560 N.Y.S.2d 779, 780 (1st Dep't 1990) (upholding determination that a nondiscretionary bonus plan created by employer guaranteed "wages" under Section 190(1)).

Tischmann mistakenly relies upon Giuntoli v. Garvin Guybutler Corp., 726 F. Supp. 494, 508-09 (S.D.N.Y. 1989), in which this Court determined that a

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[9] Severance pay clearly falls within the broad definition of "wages." See, e.g., Metchick v. Bidermann Indus. Corp., No. 91 Civ. 2329, 1993 U.S. Dist. LEXIS 4278, at(S.D.N.Y. April 7, 1993).

bonus payment constituted "wages" within the meaning of Section 190(1). In Giuntoli, unlike in the present case, however, the employee was guaranteed a bonus payment as a term of employment. Id. at 507. In the case at hand, it is undisputed that the Incentive Plan permits Sheraton to determine what amount, if any, should be paid to a participating employee in addition to the regular guaranteed salary.

Finally, although the amended complaint vaguely refers to "other benefits" and "business related expenses," it is unclear to which payments Tischmann refers. Thus, as this portion of the claim does not appear to set forth any substantive article 6 claim, it cannot form the basis for recovery under Section 198(1-a). Accordingly, Sheraton's motion for summary judgment with respect to Tischmann's Section 198(1-a) claim based on Sheraton's failure to pay (1) a 1991 bonus under the Incentive Plan; and (2) "other benefits" and "business related expenses" is granted.

VIII. Defamation Claims

In his Tenth Claim for Relief, Tischmann alleges that several Sheraton employees, acting in the scope of their employment, defamed him by disclosing the false sexual harassment allegations to other Sheraton employees and certain unnamed individuals. Specifically, although not detailed in the amended complaint, it appears that Tischmann's claim is based on alleged statements by (1) Cannon to her boyfriend; (2) Sheraton to Crain's; (3)

Sheraton to the New York Observer; (4) Power to a St. Regis union representative; (5) Palmer to Flanders; and (6) Madda to unnamed St. Regis employees.[10]

In order to establish a prima facie case of slander, a plaintiff must prove (1) an oral defamatory statement of fact, (2) regarding the plaintiff, (3) published to a third party by the defendant, and (4) injury to the plaintiff. Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 61 (2d Cir. 1993). Sheraton argues that it is entitled to summary judgment with respect to all six alleged statements on the ground that none of the allegedly defamatory statements were published.

With respect to the first alleged statement, even if Cannon had informed her boyfriend about Sheraton's sexual harassment investigation of Tischmann, this statement is not actionable against Sheraton because it was not made within the scope of her employment. See H & H Int'l Corp. v. J. Pellechia Trucking, Inc., 119 F.R.D. 352, 353 (S.D.N.Y. 1988) (stating that employers are only liable for the torts of employees committed within the scope of their employment).

As for the second and third allegedly slanderous statements, namely Sheraton's statements to Crain's and the New York Observer, the Court finds that there was no

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[10] Tischmann's reference to these six alleged statements appears in his Opposition Memorandum of Law.

slander as a matter of law. A review of the Crain's article indicates that Sheraton refused any comment regarding Tischmann's termination. With respect to the New York Observer inquiry, it appears that Tischmann's claim is based on Sheraton's failure to deny that Tischmann had been terminated on sexual harassment grounds. Tischmann cites to no authority, however, for the proposition that Sheraton has an affirmative obligation to lie rather than refuse to confirm or deny the statements of a third party.

With respect to the remaining three alleged statements, the Court finds that Tischmann has failed to come forward with any evidence that any such statements were made. Tischmann's failure to present evidence in support of his position is fatal to his claim. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 249 (stating that summary judgment should be granted where the nonmovant's evidence is merely colorable, conclusory, speculative or not significantly probative). Accordingly, Sheraton's motion for summary judgment dismissing the Tenth Claim for Relief is granted.

As for Tischmann's Eleventh Claim for Relief, setting forth a claim based on a theory of "compelled self-publication defamation," the Court finds that New York law does not recognize this cause of action. See Wieder v. Chemical Bank, 202 A.D.2d 168, 608 N.Y.S.2d 195, 196 (1st Dep't 1994). Accordingly, Sheraton's motion with respect to the Eleventh Claim for Relief is granted.

CONCLUSION

For the reasons set forth above, Sheraton s motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing Tischmann's First, Second, Third, Fourth, Fifth, Seventh, Tenth and Eleventh Claims for Relief is granted. Sheraton's motion with respect to Tischmann's Sixth and Eighth Claims for Relief is denied. Sheraton's motion with respect to the Ninth Claim for Relief is granted except to the extent it is predicated on Sheraton's refusal to pay severance pursuant to the Severance Plan. The parties are directed to submit a joint pretrial order by June 14, 1995 and appear at a pre-trial conference on June 21, 1995 at 2:00 p.m.

SO ORDERED.

SHIRLEY WOHL KRAM
United State District Judge

Dated: New York, New York
April 7, 1995

APPENDIX D

Appendix D
28 U.S.C. §1102

Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provided retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee

pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

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